

in the Second Appeal, No. 3:18-CV-1822-D.

In the Third Appeal, No. 3:19-CV-0291-D, the court AFFIRMS the bankruptcy court's order confirming the Plan and approving the disclosure statement.

The court DENIES Acis' April 12, 2019 motion to substitute party.

AFFIRMED in part; DISMISSED in part.

July 18, 2019.

  
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SIDNEY A. FITZWATER  
SENIOR JUDGE

## EXHIBIT 20

Case: 19-10847 Document: 00515903826 Page: 1 Date Filed: 06/17/2021

**United States Court of Appeals  
for the Fifth Circuit**

United States Court of Appeals  
Fifth Circuit

**FILED**

June 17, 2021

Lyle W. Cayce  
Clerk

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No. 19-10847

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IN THE MATTER OF: ACIS CAPITAL MANAGEMENT, L.P.,

*Debtor,*

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NEUTRA LIMITED;

*Appellant,*

*versus*

ROBIN E. PHELAN, CHAPTER 11 TRUSTEE,

*Appellee.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:19-CV-291

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No. 19-10847

Before SMITH, HO, and OLDHAM, *Circuit Judges*.

PER CURIAM:\*

Having thoroughly reviewed the parties' briefs and arguments, we conclude the district court's judgment affirming the bankruptcy court's order confirming the Chapter 11 plan must be AFFIRMED. We further conclude the appeal of the district court's plan injunction is moot and must be DISMISSED.

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.



## *United States Court of Appeals*

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE,  
Suite 115  
NEW ORLEANS, LA 70130

June 17, 2021

### MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing  
or Rehearing En Banc

No. 19-10847 Neutra v. Phelan  
USDC No. 3:19-CV-291

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

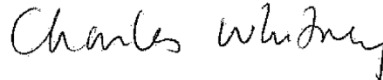
Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

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The judgment entered provides that appellant pay to appellee the costs on appeal. A bill of cost form is available on the court's website [www.ca5.uscourts.gov](http://www.ca5.uscourts.gov).

Sincerely,

LYLE W. CAYCE, Clerk



By: \_\_\_\_\_  
Charles B. Whitney, Deputy Clerk

Enclosure(s)

Ms. Annmarie Antoniette Chiarello  
Mr. Phillip Lewis Lamberson  
Mr. Jeffrey Scott Levinger  
Mrs. Rakhee V. Patel

## EXHIBIT 21

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

<p>In re:</p> <p>HIGHLAND CAPITAL MANAGEMENT,  L.P.,<sup>1</sup></p> <p style="text-align: right;">Debtor.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Chapter 11</p> <p>Case No. 19-12239 (CSS)</p> <p><b>Hearing Date: TBD</b></p> <p><b>Objection Deadline: TBD</b></p>
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**MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS  
FOR AN ORDER TRANSFERRING VENUE OF THIS CASE TO THE UNITED  
STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS**

The official committee of unsecured creditors (the “Committee”) of Highland Capital Management, L.P. (the “Debtor”), hereby submits this motion (this “Motion”) for entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Proposed Order”), pursuant to 28 U.S.C. §§ 1408 and 1412 and Rule 1014 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”), transferring the venue of the above-captioned chapter 11 case to the United States Bankruptcy Court for the Northern District of Texas.

**PRELIMINARY STATEMENT**

1. Although a debtor’s choice of venue generally warrants deference, this case presents unique facts that make a change in venue appropriate. The Debtor has only one location in the United States—its Dallas, Texas headquarters, which houses the Debtor’s management and key personnel. In fact, the Debtor’s headquarters sit less than two miles from the United States Bankruptcy Court for the Northern District of Texas (the “Dallas Bankruptcy Court”), making the venue clearly more convenient for the Debtor and its management than Delaware. Additionally,

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<sup>1</sup> The Debtor’s last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

although the Debtor's creditors span the nation, a substantial number of the Debtor's creditors (including several of the top twenty unsecured creditors and Committee members) are concentrated in Texas, or the Midwest more broadly. Likewise, nearly all of the professionals active in this case are concentrated in Texas, Chicago, or Los Angeles. The Dallas Bankruptcy Court is more centrally located and easily accessible to the key parties in this case, along with their advisors. Transferring venue from Wilmington, Delaware to Dallas, Texas would result in greater efficiencies and significant cost savings for the Debtor's estate.

2. Moreover, the Dallas Bankruptcy Court is already intimately familiar with the Debtor's principals and complex organizational structure—the involuntary chapter 11 cases of the Debtor's former affiliates and current Committee members, Acis Capital Management, L.P. and Acis Capital Management GP, L.P. (collectively, "Acis") are pending in the Dallas Bankruptcy Court. Specifically, the Dallas Bankruptcy Court has (a) heard multiple days' worth of material testimony from the Debtor's principal owner (James Dondero), the Debtor's minority owner (Mark Okada), the Debtor's general counsel, at least two assistant general counsels, and numerous other employees of the Debtor and other witnesses; and (b) issued at least six published opinions to date, many of which have been affirmed on appeal to the United States District Court for the Northern District of Texas (the "Dallas District Court") in subsequent published opinions. The Dallas Bankruptcy Court is still presiding over an adversary proceeding commenced by the Debtor and its affiliates, and the Debtor's appeal of Acis's confirmed chapter 11 plan is still pending before the Fifth Circuit. As evidenced by the published opinions, the Dallas Bankruptcy Court and the Dallas District Court are intimately familiar with the Debtor's business, principal owner, and key executives. For these reasons, the Dallas Bankruptcy Court is uniquely positioned to oversee this chapter 11 case.

3. The Committee respectfully submits that, for the reasons set forth above and discussed more fully below, based on the unique facts of this case, both the interests of justice and convenience of the parties justify an exception to the general deference granted to a debtor's choice of venue and warrant the transfer of venue to the Dallas Bankruptcy Court.

### **JURISDICTION**

4. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and the Committee confirms its consent, pursuant to rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), to the entry of a final order or judgment by the Court in connection with this Motion if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

5. The statutory and other bases for the relief requested herein are 28 U.S.C. §§ 1408 and 1412, Bankruptcy Rule 1014, and Local Rule 1014-1.

### **BACKGROUND**

6. On October 16, 2019, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Court"). The Committee was appointed by the United States Trustee on October 29, 2019 [Docket No. 65].

#### **I. The Debtor's Connections to Dallas.**

7. As noted in the Voluntary Petition [Docket No. 1], the Debtor's principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201, which also serves as the Debtor's

international headquarters, and, in fact, its only office in the United States. *See Declaration of Frank Waterhouse in Support of First Day Motions* [Docket No. 9] (the “First Day Declaration”), ¶ 7. Although it is unclear how many of the Debtor’s 76 employees are based in the Debtor’s international offices, presumably those employees based in the U.S. live in or around the Debtor’s headquarters in Dallas, Texas. Furthermore, all but one of the Debtor’s equity holders are also located in Dallas, Texas. *See Voluntary Petition* [Docket No. 1], at pg. 14. In sum, Dallas, Texas is the epicenter of the Debtor’s operations.

## **II. The Dallas Bankruptcy Court’s Familiarity with the Debtor.**

8. Prior to the commencement of this chapter 11 case, the Debtor was (and currently remains) actively involved in the involuntary chapter 11 case of Acis, its then-affiliate and current Committee member, captioned *In re Acis Capital Mgmt., L.P.*, Case No. 18-30264 (SGJ) (the “Acis Bankruptcy”). Until 2019, Acis was the “structured credit arm of Highland.” *In re Acis Capital Mgmt., L.P.*, Nos. 18-30264 (SGJ), 2019 Bankr. LEXIS 292, at \*17 n. 21 (Bankr. N.D. Tex. Jan. 31, 2019) (the “Acis Confirmation Opinion”), *aff’d*, 604 B.R. 484 (N.D. Tex. 2019).<sup>2</sup> Acis did not have any of its own employees and, instead, contracted with the Debtor to perform all day-to-day functions, meaning that all Acis corporate representatives and witnesses in the Acis Bankruptcy were employees of the Debtor. *Id.* at \*9. Moreover, there was complete overlap between Acis and the Debtor at the executive level, with the Debtor’s CEO James Dondero serving as President of Acis and the Debtor’s CFO, and first day declarant, Frank Waterhouse serving as Treasurer.

9. The Acis Bankruptcy commenced on January 30, 2018, when Joshua N. Terry filed involuntary petitions against Acis to commence chapter 7 cases in the Dallas Bankruptcy Court.

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<sup>2</sup> The Acis Confirmation Opinion is attached hereto as Exhibit B.

In connection with a hotly-contested trial on the involuntary petitions, the Dallas Bankruptcy Court heard seven days of testimony and argument, entered orders for relief and issued a written opinion, which is attached hereto as **Exhibit C** (the “Acis Involuntary Opinion”). Testimony included that of the Debtor’s co-founder and CEO, James Dondero, the Debtor’s co-founder and then-Chief Investment Officer, Mark Okada, the Debtor’s General Counsel, Scott Ellington, the Debtor’s Controller, David Klos, and the Debtor’s Assistant General Counsel, Isaac Leventon.

10. In May 2018, the Acis bankruptcy cases were converted from Chapter 7 to Chapter 11, and a Chapter 11 Trustee was appointed “due to what the bankruptcy court perceived to be massive conflicts of interest with regard to the Debtors’ management.” *See* Acis Confirmation Op. at \*15.

11. The Debtor and its affiliates were, and remain, exceptionally active throughout the Acis Bankruptcy, objecting to virtually every action proposed by the Chapter 11 Trustee throughout the case. *See In re Acis Capital Mgmt., L.P.*, 603 B.R. 300, 302 (Bankr. N.D. Tex. 2019). As a result, the Dallas Bankruptcy Court was forced to conduct many evidentiary hearings, during which the Debtor’s executives and employees were often called to testify. Overall, between the Acis Bankruptcy and related adversary proceedings, the Dallas Bankruptcy Court has to date reviewed approximately 700 exhibits, heard more than thirty days of testimony and oral argument, and issued six opinions. The Dallas District Court has also ruled on three appeals related to the Acis Bankruptcy, all of which were filed by the Debtor and/or its affiliates. The Debtor’s appeal of the Acis confirmation order is now pending before the Fifth Circuit.<sup>3</sup>

12. The Dallas Bankruptcy Court is also currently adjudicating a number of fraudulent transfer causes of action that Acis has brought against the Debtor and certain of its non-debtor

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<sup>3</sup> *See generally Debtor’s Application for an Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel Nunc Pro Tunc to the Petition Date* [Docket No. 69] and



affiliates in a consolidated adversary case (the “Acis Adversary Proceeding”). Distilled to its essence, the Acis Adversary Proceeding concerns actions taken by the Debtor and its affiliates to denude the Acis debtors’ estates of their value and frustrate an imminent, substantial judgment against Acis. *See Acis Capital Mgmt., GP, LLC v. Highland Capital Mgmt., L.P. (In re Acis Capital Mgmt., L.P.)*, 600 B.R. 541, 549 (Bankr. N.D. Tex. 2019) (the “Acis Arbitration Opinion”).<sup>4</sup>

13. In sum, the Dallas Bankruptcy Court and the Dallas District Court are already intimately familiar with the Debtor’s complex structure, its management, and key personnel, and are well-versed in the contentious relationship between the Debtor and several of its largest creditors, including members of the Committee. Accordingly, the Dallas Bankruptcy Court is uniquely situated to oversee this chapter 11 case.

#### **RELIEF REQUESTED**

14. By this Motion, the Committee requests entry of the Proposed Order, substantially in the form attached hereto as **Exhibit A**, transferring the venue of this chapter 11 case to the Dallas Bankruptcy Court.

#### **BASIS FOR RELIEF**

### **III. The Dallas Bankruptcy Court is an Appropriate Venue Under 28 U.S.C. § 1408.**

15. Section 1408 of title 28 of the United States Code provides that bankruptcy cases may be commenced in the district court for the district “in which the domicile, residence, principal place of business in the United States, or principal assets in the United States” of the debtor is

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*Debtor’s Application for an Order Authorizing the Retention and Employment of Lynn Pinker Cox & Hurst LLP as Special Texas Litigation Counsel Nunc Pro Tunc to the Petition Date [Docket No. 70]* (describing the Debtor’s ongoing litigation and involvement with the Acis Bankruptcy).

<sup>4</sup> A copy of the Acis Arbitration Opinion is attached hereto as **Exhibit D**.

located or the district “in which there is a pending case under title 11 concerning such person’s affiliate.”

16. The Debtor’s headquarters, and indeed its only office in the United States, is located in Dallas, Texas. Moreover, had this chapter 11 case commenced mere months ago, the Acis Bankruptcy would be a “pending case under title 11 concerning” the Debtor’s affiliate.<sup>5</sup> The Dallas Bankruptcy Court easily satisfies the statutory venue requirements under 28 U.S.C. § 1408.

**IV. The Court Should Exercise its Discretion to Transfer Venue to the Dallas Bankruptcy Court.**

17. It is within a court’s discretion to transfer a case to another venue if it is “in the interest of justice or for the convenience of the parties.” 28 U.S.C. § 1412. Courts have interpreted this statutory provision to create two distinct bases upon which transfer of venue may be granted: interest of justice *or* convenience of the parties. *See In re Qualtec Inc.*, No. 11-12572 (KJC), 2012 WL 527669, at \*6 (Bankr. D. Del. Feb. 16, 2012). Movants for transfer of venue have the burden of showing that a transfer is warranted based on the preponderance of the evidence.<sup>6</sup> *Id.* at \*5.

**A. Transferring Venue to the Dallas Bankruptcy Court Would Serve the Convenience of the Parties.**

18. In determining whether a venue transfer would serve the convenience of the parties, courts generally examine the following six factors: “(a) proximity of the creditors of every kind to the court; (b) proximity of the debtor; (c) proximity of the witnesses who are necessary to the administration of the estate; (d) the location of the debtor’s assets; (e) the economic administration of the estate; and (f) the necessity for ancillary administration in the event of liquidation.” *In re*

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<sup>5</sup> The Debtor ceased to be an affiliate of Acis following confirmation of the Acis plan of reorganization in January 2019, when equity in reorganized Acis was distributed to Mr. Terry in exchange for a reduction of his allowed claim.

<sup>6</sup> To meet its burden herein, the Committee is relying on the record of this case, including the First Day Declaration, and the established record of the Acis Bankruptcy. The Committee therefore does not anticipate there being any need to hold an evidentiary hearing on this Motion.

*Rests. Acquisition I, LLC*, No. 15-12406 (KG), 2016 WL 855089, at \*2 (Bankr. D. Del. Mar. 4, 2016) (quoting *Commonwealth of Puerto Rico v. Commonwealth Oil Refining Co. (In re Commonwealth Oil Refining Co.)*, 596 F.2d 1239, 1247 (5th Cir. 1979)). Under this analysis, the factor given the most weight is the economic and efficient administration of the estate. *Id.*

**1. Proximity of Creditors of Every Kind to the Court.**

19. Of the Debtor's twenty largest unsecured creditors, at least seven<sup>7</sup> are listed as having Texas addresses: Acis, Joshua and Jennifer Terry, McKool Smith, P.C., Foley Gardere, DLA Piper LLP (US), Lackey Hershman LLP, and Andrews Kurth LLP. *See* Voluntary Petition [Docket No. 1]. Additionally, of the total known claims at this juncture, it appears that a significant number of the Debtor's creditors are located in Texas, and the rest of the creditors appear to be scattered across the United States. No known creditors appear to be based in Delaware. *See id.*

20. Courts may also focus on the location of the debtor's and creditors' professionals in deciding whether to transfer venue. *See In re Caesars Entm't Operating Co., Inc.*, No. 15-10047 (KG), 2015 WL 492529, at \*6 (Bankr. D. Del. Feb. 2, 2015). The Committee's proposed counsel is primarily located in Chicago, Illinois, but also maintains an office in Dallas, Texas (where its litigation team for this case is based). If this case were to proceed before this Court, the Committee would have to retain Delaware co-counsel.<sup>8</sup> Additionally, several of the Debtor's largest creditors are separately represented by counsel based in the Midwest: the Acis is represented by the Rogge Dunne Group and Winstead PC in Dallas [Docket No. 81], the Redeemer Committee of the Highland Crusader Fund is represented by Jenner & Block LLP primarily out of its Chicago office

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<sup>7</sup> Additionally, although listed with a North Carolina address, CLO Holdco, Ltd. is an affiliate of and controlled by the Debtor, whose principal place of business is in the Northern District of Texas. The Debtor also lists Reid Collins & Tsai's New York office, despite the fact that the firm is a Texas limited liability partnership based in Texas.

<sup>8</sup> Under Local Rule 9010-1(d), the Committee has until November 27, 2019, to obtain Delaware co-counsel, if necessary.

[Docket Nos. 1, 36], and USB Securities LLC and UBS AG London Branch is represented by Latham & Watkins LLP, which has an office in Houston [Docket No. 85].

21. Considering the proximity of both the Debtor's creditors and their professionals to the Dallas Bankruptcy Court, this factor should weigh in favor of transfer. *See In re Rehoboth Hosp., LP*, No. 11-12798 (KG), 2011 WL 5024267, at \*3 (Bankr. D. Del. Oct. 19, 2011) (concluding that, on balance, this factor favored transfer to Texas when the overwhelming majority of creditors were located in Texas).

## **2. Proximity of the Debtor to the Court.**

22. Courts have noted that this inquiry should focus primarily on the parties that must appear in court. *See Caesars Entm't Operating Co., Inc.*, 2015 WL 495259, at \*6. The Debtor's headquarters, and only office located in the United States, is in Dallas, Texas. *See First Day Decl.*, at ¶ 7. As a result, it is likely that any of the Debtor's personnel who would have to appear in court are located in Dallas, Texas. The Debtor has no connection to Delaware other than the fact that it was formed there.

23. The Committee concedes that Debtor's counsel maintains an office in Delaware but does not have an office in Dallas. That said, Debtor's counsel represents itself as having a "national presence," including in the Fifth Circuit,<sup>9</sup> and its lead lawyers on this matter are based in Los Angeles. The Debtor's proposed financial advisor team is also predominantly based in Los Angeles with several members located in Chicago. No proposed advisor from Development Specialists, Inc. is located on the East Coast, let alone in Delaware. *See Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) to Employ and Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, Additional Personnel, and Financial Advisory and*

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<sup>9</sup> See <http://www.pszjlaw.com/about-presence.html#circuit5>.

*Restructuring-Related Services*, Nunc Pro Tunc as of the Petition Date [Docket No. 75], Ex. A.

Accordingly, the Committee respectfully submits that this factor weighs in favor of transferring venue to the Dallas Bankruptcy Court.

**3. Proximity of the Witnesses Necessary to the Administration of the Estate.**

24. The Committee anticipates that the witnesses likely to be necessary in this chapter 11 case are the Debtor's management, who are all located in Dallas, Texas, or the Debtor's financial advisors, who are all located in either Chicago, Illinois, or Los Angeles, California. Dallas, Texas, is significantly closer to any potential witness than Wilmington, Delaware. Thus, the Committee respectfully submits that this factor also weighs in favor of transferring venue to the Dallas Bankruptcy Court.

**4. Location of the Assets.**

25. The location of the Debtor's assets is not as important as other factors where "the ultimate goal is rehabilitation rather than liquidation." *See In re Caesars Entm't Operating Co., Inc.*, 2015 WL 495259, at \*6 (quoting *In re Enron Corp.*, 274 B.R. 327, 347 (Bankr. S.D.N.Y. 2002)). Although the Committee believes that the Debtor's U.S. assets would be located at the Debtor's headquarters in Dallas, Texas, the Committee does not believe this factor important to the Court's decision.

**5. Economic Administration of the Estate.**

26. As noted above, the most important factor is the economic and efficient administration of the Debtor's estate. *Id.* The Committee does not dispute the ability of this Court to administer this chapter 11 case in a just and efficient manner. That said, there are many factors that make the Dallas Bankruptcy Court the more economical venue. As discussed in more detail below as part of the "interests of justice" analysis: (1) there is a higher concentration of creditors

and creditors' counsel in Texas and the Midwest than elsewhere in the country; (2) the Debtor and all of its U.S. personnel are in Dallas, Texas; (3) Dallas, Texas is more centrally located in the United States than Wilmington, Delaware and arguably easier and cheaper for parties to travel to; (4) most creditors would need to obtain Delaware co-counsel if venue remains before this Court; and (5) the Dallas Bankruptcy Court and the Dallas District Court has already expended great time and effort familiarizing itself with the Debtor, the Debtor's operations, and the disputes between the Debtor and some of its largest creditors. For these reasons and the reasons set forth below in Section II.B, this factor weighs heavily in favor of transferring venue to the Dallas Bankruptcy Court. *See In re Qualtec, Inc.* 2012 WL 527669, at \*6 (noting that same considerations for this factor arise in applying the "interest of justice" prong).

**6. Necessity for Ancillary Administration if Liquidation Should Result.**

27. "Most cases do not consider liquidation because it is illogical to focus on liquidation contingencies when the goal of the bankruptcy is reorganization." *In re Dunmore Homes, Inc.*, 380 B.R. 663, 672 (Bankr. S.D.N.Y. 2008). However, should this case be converted to a liquidation, the Debtor's personal property would be predominantly located in Dallas, Texas. As a result, this factor also weighs in favor of transfer.

**B. Interests of Justice.**

28. When determining whether a transfer would serve the interests of justice, courts consider whether such transfer "would promote the efficient administration of the estate, judicial economy, timeliness, and fairness." *Caesars Entm't Operating Co., Inc.*, 2015 WL 495259, at \*7 (quotations omitted). The interests of justice standard is a "broad and flexible standard which must be applied on a case-by-case basis." *In re Safety-Kleen Corp.*, Adv. Proc. No. 00-1984, 2001 Bankr. LEXIS 1296, at \*6 (Bankr. D. Del. Aug. 27, 2001) (citing *Gulf States Expl. Co. v. Manville Forest Prods. Corp.* (*In re Manville Forest Prods. Corp.*), 896 F.2d 1384, 1391 (2d Cir. 1990)).

**1. Judicial Economy.**

29. Judicial economy would be served by transferring this case to the Dallas Bankruptcy Court. At the time of this filing, this Court has only held one hearing, granting interim relief for a handful of routine “first day” motions. In contrast, the Dallas Bankruptcy Court has heard at least 30 days of testimony, including that of the Debtor’s executives, and conducted countless hearings in the Acis Bankruptcy. With the exception of the Debtor’s proposed chief restructuring officer and Mr. Waterhouse, the Dallas Bankruptcy Court is familiar with nearly all of the Debtor’s senior management. As summarized above, the Dallas Bankruptcy Court and Dallas District Court have already devoted multiple days of court time to the Debtor.

30. Additionally, Acis’s claim against the Debtor (which is listed on the list of twenty largest unsecured creditors) and the Debtor’s proof of claim and administrative claim against Acis (which is technically an asset of the Debtor’s estate) are currently pending in the Dallas Bankruptcy Court. Judicial economy would best be served by utilizing the time and resources already extended by the Dallas Bankruptcy Court in connection with these claims. This factor weighs overwhelmingly in favor of transfer. Indeed, it is hard to imagine a case where judicial economy would be better served by a transfer of venue under 28 U.S.C. § 1412.

31. Courts in this district have historically placed a particular emphasis “on the “learning curve” that typically militates against a transfer. *See In re Rests. Acquisition I, LLC*, No. 15-12406 (KG), 2016 WL 855089, at \*5 (Bankr. D. Del. Mar. 4, 2016). This case is unique in that the “learning curve” that typically militates against a transfer in the interests-of-justice basis is actually *inverted*. That is, it is not the proposed transferee court that will have a “learning curve,” but rather it is this Court that would. Given that this Court has only considered first day relief, and on an interim basis, while the Dallas Bankruptcy Court and Dallas District Court both have

intimate familiarity with the parties and their businesses, transferring the venue would be in furtherance of judicial economy.

**2. Economic and Efficient Administration of the Bankruptcy Estate.**

32. As previously noted, there are economic efficiencies available in Dallas, Texas that are not available in Wilmington, Delaware. Venue in Dallas would allow the Debtor's employees to easily attend hearings in this case and thus eliminate the need for air travel for most witnesses. The Debtor's headquarters are located in The Crescent in Dallas, Texas, approximately 1.2 miles from the Dallas Bankruptcy Court. By contrast, this Court is located approximately 1,437 miles from the Debtor's headquarters. Travel to this Court from the Debtor's headquarters requires, at a minimum, a 30-minute car ride to Dallas/Fort Worth International Airport, approximately three hours flying time to Philadelphia International Airport, and then a 30-minute car ride to Wilmington, Delaware. The foregoing does not take into account recommended early arrival times at airports for check-in, flight delays, traffic, or the need for overnight stays in Wilmington. If this case remains in Delaware, critical management personnel will be required to spend extended periods away from their offices when they should be focused on maximizing value for all creditors.

33. Additionally, as the Debtor's professionals and proposed CRO are primarily located in Los Angeles, venue in Dallas would eliminate hours of travel time and the administrative expense associated with the same. Dallas-Fort Worth International Airport, consistently the third-busiest airport in the country (behind Chicago O'Hare and Atlanta Hartsfield-Jackson), offers nearly 1,800 flights per day. American Airlines alone offers approximately 14 non-stop flights per day from LAX to DFW. According to FlightSphere.com, there are approximately 20 total flights per day from LAX to DFW and 7 flights per day from DAL to LAX. By contrast, according to FlightSphere.com, there are approximately 10 flights per day from DFW to Philadelphia and approximately 8 flights per day from DAL to Philadelphia. The flight from LAX to DFW is



approximately 3 hours, whereas the flight from LAX to Philadelphia is approximately 6 hours. *See In re Rehoboth Hosp., LP*, No. 11-1279 (KG), 2011 Bankr. LEXIS 3992, at \*15 (Bankr. D. Del. October 19, 2011) (transferring venue of a single asset real estate case from Delaware to Texas because “the estate may incur significant travel costs to obtain the testimony of witnesses that are located in Texas”).

34. Additionally, Rule 45 of the Federal Rules of Civil Procedure, incorporated by Bankruptcy Rule 9016, mandates that contested non-party discovery disputes (potentially like those related to the Debtor’s approximately 2,000 non-debtor affiliates) be heard in the place of compliance, which would most likely be in the Northern District of Texas. The Committee is already aware of the Debtor’s history of contesting discovery. *See, e.g., Hamilton Partners, L.P. v. Highland Capital Mgmt., L.P.*, CV 6547-VCN, 2016 WL 61223, at \*1 (Del. Ch. Feb. 2, 2016). It is therefore likely that the Dallas District Court and Dallas Bankruptcy Court will need to hear and resolve multiple discovery disputes. In light of that inevitability, it would be sensible to transfer this case so that related disputes aren’t being heard in multiple venues.

35. There is no doubt that transferring venue to Dallas would promote the economic and efficient administration of this chapter 11 case. This factor weighs in favor of transfer.

### **3. Timeliness.**

36. As of the date of this Motion, this case has only been pending for 16 days. The Committee is also seeking to have this Motion heard on an expedited basis, as set forth in the motion to shorten notice filed concurrently herewith. *Cf. In re Jones*, 39 B.R. 1019, 1020 (Bankr. S.D.N.Y. 1984) (“[t]he debtor’s motion to change venue is untimely given the fact that this case was commenced over one and one-half years ago”). The Court has only considered the Debtor’s request for first day relief on an interim basis. The next hearing is not scheduled until November 19, 2019. The Motion is timely and this factor weighs in favor of transfer.

**4. Fairness.**

37. Transferring this chapter 11 case to a venue where employees, creditors, and numerous other parties-in-interest may more easily participate in the restructuring process would be manifestly fair. To the extent the Debtor chose this forum in order to distance itself from largely unfavorable findings, fairness dictates that this case should be transferred.

\* \* \* \* \*

38. For the foregoing reasons, it is both in the interest of justice and for the convenience of the parties that this chapter 11 case be transferred to the Dallas Bankruptcy Court. The majority of the parties and professionals involved in this chapter 11 cases are more centrally located to Dallas, Texas than Wilmington, Delaware, which would create significant costs savings to the Debtor's estate compared to keeping the case in Delaware. Moreover, the Dallas Bankruptcy Court and Dallas District Court are both well-versed in the facts and issues that will undoubtedly need to be addressed in this chapter 11 case. As such, the Committee respectfully requests that this Court transfer venue of this case to the Dallas Bankruptcy Court.

**NOTICE**

39. Notice of this Motion will be provided to (i) the Debtor, (ii) the Office of the United States Trustee for the District of Delaware, and (iii) any party that has requested notice pursuant to Local Rule 2002-1 as of the date of this Motion. In light of the nature of the relief requested herein, the Committee submits that no other or further notice is necessary.

*[Remainder of Page Intentionally Left Blank]*

WHEREFORE, the Committee respectfully requests that the Court enter the Proposed Order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and such other and any further relief as the Court may deem just and proper.

Dated: November 1, 2019  
Wilmington, Delaware

SIDLEY AUSTIN LLP

/s/ Bojan Guzina

Bojan Guzina  
Matthew A. Clemente  
Alyssa Russell  
One South Dearborn Street  
Chicago, Illinois 60603  
Telephone: (312) 853-7000  
Facsimile: (312) 853-7036

-and-

Jessica C. K. Boelter  
787 Seventh Avenue  
New York, New York 10019  
Telephone: (212) 839-5300  
Facsimile: (212) 839-5599

-and-

Penny P. Reid  
Paige Holden Montgomery  
2021 McKinney Avenue  
Suite 2000  
Dallas, Texas 74201  
Telephone: (214) 981-3300  
Facsimile: (214) 981-3400

PROPOSED ATTORNEYS FOR THE OFFICIAL  
COMMITTEE OF UNSECURED CREDITORS

**Exhibit A**

**Proposed Order**

**FOR THE DISTRICT OF DELAWARE**

) Chapter 11  
)  
) Case No. 19-12239 (CSS)  
)  
) **Ref. Docket No.:** \_\_\_\_

**BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS**

appearing therefor, it is HEREBY ORDERED THAT:

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

1. Pursuant to Rule 1014(b), in the interest of justice and for the convenience of parties, the above-captioned chapter 11 case shall proceed in the Dallas Bankruptcy Court. Accordingly, the Court will transfer this case to the Dallas Bankruptcy Court pursuant to 28 U.S.C. § 1412.

Dated: \_\_\_\_\_, 2019  
Wilmington, Delaware

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Honorable Christopher S. Sontchi  
United States Bankruptcy Judge

**Exhibit B**

**Acis Confirmation Opinion**



CLERK, U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

**ENTERED**

THE DATE OF ENTRY IS ON  
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed January 31, 2019

*Harry G. C. Gann*  
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>IN RE:</b>	§	
	§	
<b>ACIS CAPITAL MANAGEMENT, L.P.,</b>	§	<b>CASE NO. 18-30264-SGJ-11</b>
	§	<b>(Chapter 11)</b>
<b>Debtor.</b>	§	

<b>IN RE:</b>	§	
	§	
<b>ACIS CAPITAL MANAGEMENT GP,</b>	§	<b>CASE NO. 18-30265-SGJ-11</b>
<b>L.L.C.,</b>	§	<b>(Chapter 11)</b>
	§	
<b>Debtor.</b>	§	

**BENCH RULING AND MEMORANDUM OF LAW IN SUPPORT OF:**  
**(A) FINAL APPROVAL OF DISCLOSURE STATEMENT; AND (B)**  
**CONFIRMATION OF CHAPTER 11 TRUSTEE'S THIRD AMENDED JOINT PLAN**

Before this court is a request by the Chapter 11 Trustee (herein so called) for final approval of the adequacy of a disclosure statement and for confirmation of his Third Amended



Joint Plan of Reorganization,<sup>1</sup> as amended, modified or supplemented (the “Plan”), for the two above-referenced debtors: (1) Acis Capital Management, L.P. (the “Debtor-Acis”), a Delaware limited partnership, and (2) Acis Capital Management GP, LLC, a Delaware limited liability company (the general partner of the Debtor-Acis; collectively, the “Debtors”). The two chapter 11 cases have been administratively consolidated.<sup>2</sup>

The hearing on these matters transpired over multiple days in December 2018, and the court considered the testimony of more than a dozen witnesses, more than 700 exhibits, and hundreds of pages of legal briefing. Based on the foregoing, the court ***overrules all objections*** and will confirm the Plan, including all proposed modifications to it. The Chapter 11 Trustee has demonstrated, by a preponderance of the evidence, that the Plan, as modified, satisfies the applicable provisions of the Bankruptcy Code including but not limited to Sections 1122, 1123, 1127, and 1129 of the Bankruptcy Code.<sup>3</sup> The court also approves on a final basis the adequacy of the accompanying disclosure statement to the Plan, determining that it meets the requirements set forth in Section 1125 of the Bankruptcy Code. Notice and solicitation with respect to the

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<sup>1</sup> Exhs. 508 & 509; *see also* DE ## 660, 661, 693, 702, & 769. References to “DE # \_\_” from time to time in this ruling relate to the docket number at which a pleading or other item appears in the docket maintained in these administratively consolidated Bankruptcy Cases, in Case # 18-30264.

<sup>2</sup> Note that the Debtor-Acis is, essentially, the debtor that is the operating company. As a general partner, Acis Capital Management GP, LLC is legally obligated on all of the operating company’s debt. *See* 6 Del. C. § 17-403(b) (“Except as provided in this chapter, a general partner of a limited partnership has the liabilities of a partner in a partnership that is governed by the Delaware Uniform Partnership Law in effect on July 11, 1999 (6 Del. C. § 1501 et seq.) to persons other than the partnership and the other partners.”); *see also* 6 Del. C. § 15-306(a) (“(a) Except as otherwise provided in subsections (b) and (c) of this section, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law”). The Plan jointly addresses both of the Debtors’ debts.

<sup>3</sup> *Heartland Fed. Sav. & Loan Ass’n v. Briscoe Enters. (In re Briscoe Enters.)*, 994 F.2d 1160, 1165 (5th Cir. 1993); *In re Sears Methodist Ret. Sys.*, No. 14-32821-11, 2015 Bankr. LEXIS 709, at \*8 (Bankr. N.D. Tex. Mar. 5, 2015); *In re Couture Hotel Corp.*, 536 B.R. 712, 732 (Bankr. N.D. Tex. 2015); *In re Mirant Corp.*, No. 03-46590, 2007 Bankr. LEXIS 4951, at \*19-20 (Bankr. N.D. Tex. Apr. 27, 2007).

Plan is determined to have complied with the applicable Bankruptcy Rules and due process. The court provides reasoning for its ruling below. The court directs the Chapter 11 Trustee to submit to the court for signing the proposed Findings of Fact and Conclusions of Law and Order that were filed at DE # 814. This Bench Ruling supplements those Findings of Fact and Conclusions of Law and Order and, where appropriate, should be considered additional findings and conclusions as contemplated by Fed. R. Bankr. Proc. 7052.

### **I. Background.**<sup>4</sup>

The above-referenced bankruptcy cases (the “Bankruptcy Cases”) have been pending since January 30, 2018 and have been astonishingly contentious. The Chapter 11 Trustee has been in place since on or about May 14, 2018. The Plan (which is the fourth one proposed by the Chapter 11 Trustee) has been objected to by three related entities: (a) Highland Capital Management, L.P. (“Highland”), (b) Highland CLO Funding Ltd. (“HCLOF Guernsey”), and (c) Neutra, Ltd. (“Neutra Cayman”). The Chapter 11 Trustee loosely refers to these three objectors (the “Objectors”) as “the Highlands” because they are not only related to each other (*i.e.*, they are all, directly or indirectly, part of the Highland 2,000-member corporate organizational structure), but they also have been in “lockstep” with one another in objecting to virtually every position taken by the Chapter 11 Trustee during the Bankruptcy Cases.<sup>5</sup> These Objectors’ parties-in-interest status will be explained below.

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<sup>4</sup> For a complete set of background facts, the court incorporates herein by reference its Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Petitions, entered April 13, 2018. DE # 118. Exh. 243.

<sup>5</sup> It is also undisputed that, prior to the appointment of the Chapter 11 Trustee, *the Debtors* and Highland were affiliated and had a close relationship. Exhs. 17, 18, 22-27, 251, 619 & 649.

In simplest terms, the Debtor-Acis, which was formed in the year 2011, is primarily a CLO portfolio manager.<sup>6</sup> It manages hundreds of millions of dollars' worth of CLOs (which is an acronym for "collateralized loan obligations"). Specifically, it provides fund management services to various special purpose entities that hold CLOs. The Debtor-Acis was providing management services for five such special purpose entities (the "Acis CLOs") as of the time that it and its general partner were put into the involuntary Bankruptcy Cases. The parties have informally referred to the special purpose entities themselves as the "CLO Issuers" or "CLO Co-Issuers" but, to be clear, these special purpose entities (hereinafter, the "CLO SPEs") are structured as follows: (a) on the asset side of their balance sheets, the entities own pieces of senior debt owed by large corporations and, therefore, earn revenue from the variable interest payments made by those corporations on such senior debt; and (b) on the liability side of their balance sheets, the entities have obligations in the form of notes (*i.e.*, tranches of fixed interest rate notes) on which the CLO SPEs themselves are obligated—the holders of which notes are mostly institutions and pension funds (these tranches of notes are usually rated anywhere from Triple A to Single B, depending upon things such as their interest rate and perceived risk). The CLO SPEs make a profit, based on the spread or "delta" between: (a) the variable rates of interest paid on the assets that the CLO SPEs own (*i.e.*, the basket of senior notes); and (b) the fixed rates of interest that the CLO SPEs must pay on their own tranches of debt. At the bottom of the CLO SPEs' capital structure is their equity (sometimes referred to as "subordinated notes," but these "notes" are genuinely equity). As portfolio manager, the Debtor-Acis manages the CLO SPEs' pools of assets (by buying and selling senior loans to hold in the CLO SPEs'

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<sup>6</sup> The Debtor-Acis has managed other funds, from time to time, besides CLOs.

portfolios) and communicates with investors in the CLO SPEs. The CLO SPEs' tranches of notes are traded on the Over-the-Counter market.

To be perfectly clear, none of the CLO SPEs themselves are in bankruptcy. This has never been threatened or a concern. Only the Debtor-Acis which *manages* the CLO business is in bankruptcy. For the most part, the CLO SPEs have continued somewhat "business as usual" during the Chapter 11 Bankruptcy Cases (*i.e.*, they have continued to receive interest payments on their baskets of loans; the usual interest payments on their tranches of debt have been paid;<sup>7</sup> and baskets of loans have been bought and sold from time to time). The CLO SPEs have retained their own separate counsel during the Chapter 11 cases, have appeared from time-to-time on matters, and are not currently objecting to the Plan. There is also an indenture trustee (U.S. Bank National Association) for the CLO SPEs' debt, that has seemingly faithfully carried on its role during the Chapter 11 Bankruptcy Cases without many objections to the bankruptcy process—only making occasional statements aimed at ensuring that the indentures for the CLOs are not interfered with or disrespected. The indenture trustee has retained and appeared through its own separate counsel during the Chapter 11 Bankruptcy Cases and is not currently objecting to the Plan.

Historically, the Debtor-Acis has had four main sets of contracts that were at the heart of its business and allowed it to function. The Chapter 11 Trustee has from time-to-time credibly

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<sup>7</sup> The evidence reflected that there have been a couple of occasions recently when there were insufficient funds to make distributions to the equity. *E.g.*, Transcript 12/11/18 (PM) [DE # 790], at p. 15 (line 2) through p. 16 (line 18). But it appears to this court that these missed distributions were due to actions of Highland—as later explained herein—in improperly, surreptitiously attempting to liquidate the Acis CLOs, from the time period after the Chapter 11 Trustee was appointed, until the bankruptcy court issued an injunction to temporarily halt Highland's actions. *E.g.*, Transcript 12/11/18 (AM) [DE # 789], p. 67 (line 14) through p. 68 (line 6).

testified that these agreements essentially created an “eco-system” that allowed the Acis CLOs to be effectively and efficiently managed by the Debtor-Acis.

1. The PMAs with the CLO SPEs.<sup>8</sup>

First, the Debtor-Acis has various portfolio management agreements (the “PMAs”) *with the CLO SPEs*, pursuant to which the Debtor-Acis earns management fees. The PMAs have been the primary “assets” (loosely speaking) of the Debtor-Acis (to be more precise, the PMAs are executory contracts pursuant to section 365 of the Bankruptcy Code). They are what generate revenue for the Debtor-Acis.

2. The Sub-Advisory Agreement with Highland.<sup>9</sup>

Second, the Debtor-Acis had a Sub-Advisory Agreement (herein so called) with an insider, **Highland** (*i.e.*, one of the Objectors). Highland’s “insider” status will be further explained below. Pursuant to this agreement, the Debtor-Acis essentially sub-contracted for the use of Highland front-office personnel/advisors to perform management services for the Debtor-Acis (*i.e.*, so that the Debtor-Acis could fulfill its obligations to the CLO SPEs under the PMAs). The Debtor-Acis paid handsome fees to Highland pursuant to this agreement. This, too, was an executory contract pursuant to section 365 of the Bankruptcy Code. As explained below, this agreement was rejected (with bankruptcy court approval)<sup>10</sup> by the Chapter 11 Trustee during the Bankruptcy Cases, when the Chapter 11 Trustee credibly represented that he had not only found resources to provide these services at a much lower cost to the estate, but he also had begun to

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<sup>8</sup> Exhs. 6-10.

<sup>9</sup> Exh. 17.

<sup>10</sup> *See* 11 U.S.C. § 365(a).

believe that Highland was engaging in stealth efforts to liquidate the Acis CLOs, to the detriment of the Debtor-Acis's creditors.<sup>11</sup>

3. The Shared Services Agreement with Highland.<sup>12</sup>

Third, the Debtor-Acis also had a Shared Services Agreement (herein so called) with Highland, pursuant to which the Debtor-Acis essentially sub-contracted for the use of Highland's back-office services (again, so that the Debtor-Acis could fulfill its obligations to the CLO SPEs under the PMAs). To be clear, the Debtor-Acis had no employees of its own—only a couple of officers and members. The Debtor-Acis paid handsome fees to Highland for the personnel and back-office services that Highland provided to the Debtor-Acis. This, too, was an executory contract pursuant to section 365 of the Bankruptcy Code. As explained below, this agreement was also rejected by the Chapter 11 Trustee during the Bankruptcy Cases (with bankruptcy court approval) for the same reasons that the Sub-Advisory Agreement with Highland was rejected.

4. The Equity PMA.<sup>13</sup>

Fourth, until a few weeks before the Bankruptcy Cases were filed, the Debtor-Acis also had yet another portfolio management agreement (distinct from its PMAs with the CLO SPEs) whereby the Debtor-Acis provided services not just to the CLO SPEs themselves, but separately to the equity holder in the CLO SPEs. This portfolio management agreement with the equity holder in the CLO SPEs is sometimes referred to by the parties as the "ALF PMA," but it would probably be easier to refer to it as the "Equity PMA" (for ease of reference, the court will refer to

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<sup>11</sup> See Transcript 12/11/18 (AM) [DE # 789], at p. 48 (line 15) through p. 49 (line 16); p. 50 (line 12) through p. 52 (line 7).

<sup>12</sup> Exh. 18.

<sup>13</sup> Exh. 11.

it as the “Equity/ALF PMA”).<sup>14</sup> The Debtor-Acis did not earn a specific fee pursuant to the Equity/ALF PMA, but the Chapter 11 Trustee and certain of his witnesses credibly testified that the Debtor-Acis considered the agreement valuable and very important, because it essentially gave the Debtor-Acis the ability to control the whole Acis CLO eco-system—in other words, gave the Debtor-Acis the ability to make substantial decisions on behalf of the CLO SPEs’ *equity*—distinct from making decisions for the CLO SPEs themselves pursuant to the PMAs. The more credible evidence before the court suggests that the Equity/ALF PMA delegated to the portfolio manager (*i.e.*, the Debtor-Acis) the right to control the terms of any liquidation of collateral in an optional redemption under the terms of the CLO indentures.<sup>15</sup> In any event, shortly before the Bankruptcy Cases were filed, agents of Highland and/or others controlling the Debtor-Acis (including but not limited to Mr. James Dondero—the chief executive officer of both the Debtor-Acis and of Highland): (a) caused the Debtor-Acis to terminate this Equity/ALF PMA (notably, the counter-party to this agreement, the equity owner, would have only been able to terminate it “for cause”<sup>16</sup>); and (b) then caused the equity owner to enter into a new Equity PMA with a newly formed offshore entity called Highland HCF Advisor, Ltd. (“Highland HCF”).<sup>17</sup> Mr. Dondero, in addition to being the chief executive of Highland and the Debtor-Acis, also became the president of the newly formed Highland HCF.<sup>18</sup> The Equity/ALF PMA

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<sup>14</sup> There were actually different iterations of the Equity/ALF PMA including one dated August 10, 2015, and another dated December 22, 2016.

<sup>15</sup> Transcript 12/18/18 [DE # 804], at pp. 77-78. *See also* Exh. 11 at §§ 5 and 6.

<sup>16</sup> The Equity/ALF PMA provided that the Debtor-Acis could only be removed as portfolio manager “for cause” at § 14(a)-(e). Exh. 11. On the contrary, the Debtor-Acis could terminate the Equity/ALF PMA without cause upon at least ninety (90) days’ notice, pursuant to § 13(a)-(c). Exh. 11.

<sup>17</sup> Exh. 23 (testimony of Scott Ellington), p. 175 (lines 6-25); *see also* Transcript 12/11/18 (AM) [DE # 789], at p. 54 (line 11) through p. 55 (line 5).

<sup>18</sup> *Id.* at p. 266 (lines 1-4).

would have been an executory contract of the Debtor-Acis, pursuant to section 365 of the Bankruptcy Code, if it had not been terminated shortly before the Bankruptcy Cases. The court has heard credible testimony that leads it to conclude that the Equity/ALF PMA would have been assumed by the Debtor-Acis, pursuant to section 365 of the Bankruptcy Code, if not terminated by agents of Highland on the eve of bankruptcy. The court has heard credible testimony that it is important for a portfolio manager to have not only the PMAs with the CLO SPEs themselves, but also with the equity owners of the CLO SPEs.

## **II. A Few More Basics About CLOs.**

In the world of CLOs (like other public debt instruments) there are occasionally redemptions, refinancings, and resets. A redemption is essentially when the equity in the CLO, before maturity, calls for the liquidation of the collateral in the CLO and the repayment of the tranches of notes, so that the CLO comes to an end. A refinancing is when a lower interest rate can be accomplished in the market place on the tranches of debt of the CLO, but the maturity date and other terms remain in place (similar to a refinancing on a home mortgage). This can happen typically after a two-year non-call period. A reset is when the maturity date, the reinvestment period, or other changes in the terms of a CLO (beyond simply interest rate) are accomplished.<sup>19</sup>

It should be noted that the top tranche of notes in the CLO SPEs (AAA-rated) is considered the “controlling” class, and a majority of holders in this class can terminate the CLO manager (*i.e.*, the Debtor-Acis LP) for cause on 45 days’ notice, but these folks have apparently been content to ignore the Bankruptcy Cases and the fighting between the Debtor-Acis and

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<sup>19</sup> See generally Transcript 2/9/2018 [DE # 26], at p. 74-75.



Highland (as further described below)—no doubt because they are earning their fixed income stream without a hitch. And the bottom tranche of “notes” in the CLO SPEs (the equity) has voting rights and is a capital provider and, in certain ways, controls the CLO SPEs, by virtue of having the ability to make a redemption call after a certain “no-call” period—which would force a liquidation of the basket of loans in the CLO, with the proceeds paying down the tranches of notes, starting at the top with the Triple A’s. But, by virtue of the Equity/ALF PMA, the Debtor-Acis was really acting for the equity. It seems substantially likely to the court that this is why Highland and its agents caused the Debtor-Acis to terminate the Equity/ALF PMA (which, as mentioned above, was an agreement that the equity could have only terminated “for cause”—and it appears there would have been no “cause”).

### **III. The Non-Insider Creditors.**

The Debtor-Acis does not have many creditors. The non-insider creditors are, for the most part, Joshua Terry (“Mr. Terry”) and a few vendors (most of which are law firms).

Mr. Terry commenced the Bankruptcy Cases with the filing of involuntary bankruptcy petitions. Mr. Terry was the human being who formerly, quite successfully served as the portfolio manager for the Debtor-Acis for many years. Mr. Terry was terminated under contentious circumstances on June 9, 2016, after getting into disagreements with Mr. Dondero. Mr. Terry was technically an employee of Highland itself (like all employees are, in the Highland family of companies—no matter which subsidiary or affiliate they work for). After his employment termination, Highland sued Mr. Terry in September 2016. Mr. Terry asserted claims back against Highland and both of the above-referenced Debtors. The litigation was referred to arbitration, and, after a ten-day arbitration trial in September 2017 before “JAMS,” Mr. Terry obtained an Arbitration Award (herein so called), on October 20, 2017, jointly and

severally, against both of the Debtors in the amount of \$7,949,749.15, plus post-award interest at the legal rate. A Final Judgment (the “Terry Judgment”) confirming the Arbitration Award was entered on December 18, 2017, in the same amount as that contained in the Arbitration Award—\$7,949,749.15.

Mr. Terry commenced the Bankruptcy Cases when he became concerned that the Debtor-Acis was being rendered insolvent and unable to pay creditors including himself, due to actions undertaken by Highland and its agents immediately after entry of the Arbitration Award (*e.g.*, transfers of assets, contracts, and business away from the Debtor-Acis).

The Debtor-Acis also is obligated on large administrative expense claims, since: (a) a Chapter 11 Trustee was appointed very early—due to what the bankruptcy court perceived to be massive conflicts of interest with regard to the Debtors’ management; and (b) the Objectors have opposed virtually every action taken by the Chapter 11 Trustee during the Bankruptcy Cases, resulting in many long hearings.

#### **IV. The Objectors (all of which are “Insiders”).**

*There are no non-insider creditors objecting to the Plan.* Mr. Terry supports the Plan. The CLO SPEs and Indenture Trustee do not oppose the Plan. None of the vendors oppose the Plan. The U.S. Trustee is not opposing the Plan. As a technical matter, two impaired classes of creditors voted to accept the Plan.<sup>20</sup> *So who are the Objectors to the Plan (which Plan will be further described below) and what is their party-in-interest status here?*

As earlier mentioned, the Objectors are: (a) Highland, (b) HCLOF Guernsey, and (c) Neutra Cayman. As noted earlier, the Chapter 11 Trustee frequently refers to them collectively as “The Highlands”—but the Objectors do not like this conflation. At one time Highland and

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<sup>20</sup> Classes 2 and 3. *See* Exh. 613.

HCLOF Guernsey had the same lawyers. They do not anymore. However, they frequently file joint pleadings and take the same positions. Highland and Neutra Cayman do still have the same lawyers.

1. Highland.

Highland is a Dallas, Texas-based company that is a Registered Investment Advisor. Highland was founded in 1993 by Mr. Dondero, originally with a 75% ownership interest, and Mark K. Akada (“Mr. Akada”), originally with a 25% ownership interest. As mentioned earlier, Mr. Dondero is the chief executive of Highland. Highland, through its organizational structure of approximately 2,000 separate business entities, manages approximately \$14-\$15 billion of investor capital in vehicles including CLOs, private equity funds, and mutual funds. Highland provides employees to entities in the organizational structure, such as it did with the Debtor-Acis, through the mechanism of shared services agreements and sub-advisory agreements (as mentioned above). ***Notably, Highland’s chief executive, Mr. Dondero, served as the President of the Debtor-Acis at all relevant times prepetition.***<sup>21</sup> Highland claims to be a large creditor of the Debtor-Acis for services provided to the Debtor-Acis under the Shared Services Agreement and the Sub-Advisory Agreement. The Chapter 11 Trustee disputes these claims and has asserted numerous claims back against Highland in an adversary proceeding (the “Highland Entities Adversary Proceeding”).

In any event, Highland is a ***disputed insider creditor***. It is an “insider,” as contemplated by Bankruptcy Code section 101(31)(C), because it, beyond any shadow of a doubt, controlled the Debtor-Acis until these Bankruptcy Cases developed to the point of having a Chapter 11

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<sup>21</sup> One witness, Hunter Covitz, referred to the Debtor-Acis as the “structured credit arm of Highland.” Transcript 12/13/18 (AM) [DE # 793], at p. 57.

Trustee take charge of the Debtor-Acis. Highland does not seem to dispute that it is an insider.<sup>22</sup>

But, for the avoidance of doubt, Highland should be considered an insider of the Debtor-Acis for at least the following reasons: (a) the same human being (Mr. Dondero) was president of the Debtor-Acis and was the chief executive of Highland; (b) Highland’s General Counsel, Scott Ellington, testified that Mr. Dondero controlled them both;<sup>23</sup> and (c) Highland provided the Debtor-Acis with employees and management services pursuant to the Sub-Advisory Agreement and Shared Services Agreement.<sup>24</sup>

Additionally, the court believes that the Chapter 11 Trustee made a convincing argument in connection with Plan confirmation (and his justification for the separate classification of Highland’s claim in the Plan from other general unsecured creditors) that Highland should also be regarded as a “competitor” of the Debtor-Acis at this juncture, since they are both in the fund management business and Highland’s control over the Debtor-Acis has now been divested. Highland’s competitor status, in addition to its insider status, warrants additional scrutiny of its

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<sup>22</sup> Under section 101(31) of the Bankruptcy Code, an insider includes certain enumerated parties, such as an officer of the debtor, affiliate, *etc.* Further, the list of enumerated “insiders” is not exclusive or exhaustive. *See Wilson v. Huffman (In re Missionary Baptist Foundation of Am., Inc.)*, 712 F.2d 206, 210 (5th Cir. 1983). Recently, the United States Supreme Court stated: “Courts have additionally recognized as insiders some persons not on that [101(31)] list—commonly known as ‘nonstatutory insiders.’ The conferral of that status often turns on whether the person’s transactions with the debtor (or another of its insiders) were at arm’s length.” *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 963 (2018). The Fifth Circuit has noted that “cases which have considered whether insider status exists generally have focused on two factors in making that determination: (1) the closeness of the relationship between the parties and (2) whether the transaction . . . [was] conducted at arm’s length.” *Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1011 (5th Cir. 1992).

<sup>23</sup> *E.g.*, Exh. 23, at pp. 160 (line 15) through 161 (line 4); p. 196 (lines 14-19); p. 219 (lines 1-21).

<sup>24</sup> *See* 11 U.S.C. §§ 101(2)(D); (31)(C)(5). The court notes that, although Highland has, from time to time, alleged that Mr. Terry is a “non-statutory insider” of the Trustee, it has never put on any credible evidence to support this contention.

motivations in objecting to the Plan. More importantly, it provides a sound legal and business justification for separately classifying its claim in the Plan.

## 2. HCLOF Guernsey.

The second Objector, HCLOF Guernsey, is an entity formed in the island nation of Guernsey. It has two allegedly independent Directors from Guernsey who have provided testimony in connection with confirmation of the Plan. It was enormously clear to the court (as will be elaborated upon below) that the two Directors of HCLOF Guernsey are—stated in the kindest way possible—mere “figureheads” for HCLOF Guernsey and they defer to Highland *entirely* to tell them what to do, what to say, and when. In any event, HCLOF Guernsey is the owner of the equity in the CLO SPEs (as earlier mentioned, this equity is sometimes referred to as the “subordinated notes” in the CLO SPEs). According to HCLOF Guernsey's 2017 Annual Report and Audited Financials, all of its subordinated notes issued by the Acis CLOs are physically held at and are pledged to HCLOF Guernsey's lender, NexBank, which happens to be a Dallas bank that is an affiliate of Highland.<sup>25</sup> HCLOF Guernsey was created in the year 2015 and was formerly known as “ALF.”<sup>26</sup> Its name was changed on October 30, 2017 (ten days after Mr. Terry's Arbitration Award was entered), to allegedly distance itself from the Debtor-Acis. The equity owner HCLOF Guernsey, in turn, has three equity owners: (i) a 49% equity owner that is a charitable fund (*i.e.*, a donor advised fund or “DAF”) that was seeded with contributions from **Highland**, is managed/advised by **Highland**, and whose *independent trustee is a long-time friend of Highland's chief executive officer, Mr. Dondero*; (ii) 2% is owned by **Highland employees**; and (iii) a 49% equity owner that is a third-party institutional investor based in

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<sup>25</sup> Exh. 647.

<sup>26</sup> “ALF” is short-hand for Acis Loan Funding, Ltd.

Boston, Massachusetts that only recently invested in HCLOF Guernsey (*i.e.*, in November 2017, just after the Terry Arbitration Award was issued), and desires to remain passive and anonymous (hereinafter, the “Passive Investor”).<sup>27</sup> Notably, the Debtor-Acis itself owned a small percentage of HCLOF Guernsey, in addition to providing management services to it, until October 24, 2017 (four days after the Terry Arbitration Award was issued).

The court has allowed HCLOF Guernsey to vigorously participate in the confirmation hearing (and other hearings during the Bankruptcy Cases), although its party-in-interest status has been questionable. So how is HCLOF Guernsey a party-in-interest? The answer is a bit of a stretch—but the court has decided it is impacted by the Plan, so it should have the right to object. Its party-in-interest status has evolved during the Bankruptcy Cases.

First, early on in these Bankruptcy Cases, HCLOF Guernsey (together with Highland) sued the Chapter 11 Trustee in the above-mentioned “Highland Entities Adversary Proceeding”—mostly, if not entirely, seeking injunctive relief. At that point, the Chapter 11 Trustee treated HCLOF Guernsey as a disputed creditor,<sup>28</sup> since it was seeking equitable relief that could arguably be monetized.<sup>29</sup> However, HCLOF Guernsey subsequently withdrew its requests for relief in that Highland Entities Adversary Proceeding. But then, the Chapter 11 Trustee subsequently filed claims *against* HCLOF Guernsey in the Highland Entities Adversary Proceeding (along with his claims against Highland and a couple of other Highland entities) asserting avoidance actions and other causes of action against HCLOF Guernsey (among other

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<sup>27</sup> The testimony was that the Passive Investor committed to a \$150 million investment (\$75 million immediately and \$75 million callable over the next several years).

<sup>28</sup> In fact, on August 15, 2018, the Chapter 11 Trustee filed a proof of claim on behalf of HCLOF Guernsey. HCLOF Guernsey has since objected to the proof of claim.

<sup>29</sup> See 11 U.S.C. §§ 101(5)(B) & 101(10).

things, the Chapter 11 Trustee alleged that HCLOF Guernsey schemed with Highland to terminate the Equity/ALF PMA, in a step toward systematically dismantling the Debtor-Acis of its value). Thus, HCLOF Guernsey may ultimately owe money to this estate. But most importantly, HCLOF Guernsey should be deemed a party-in-interest because of a proposed temporary injunction in the Plan that essentially would enjoin (for a finite, defined period) HCLOF Guernsey from exercising certain of its rights with regard to its equity in the CLO SPEs, pending resolution of the Highland Entities Adversary Proceeding. This temporary injunction in the Plan, directed towards HCLOF Guernsey and affiliates, will be further described below.

### 3. Neutra Cayman.

Neutra Cayman is a Cayman island exempted company that is the equity owner *of the Debtor-Acis itself* (in contrast to HCLOF Guernsey, which only owns equity in the CLO SPEs). Neutra Cayman only acquired its equity interest in the Debtor-Acis the day after the Terry Judgment was entered (on December 18, 2017), and for no consideration, from the Dugaboy Investment Trust (a family trust on which Mr. Dondero’s sister is named trustee, that previously owned 74.9% of the Debtor-Acis) and from Mr. Akada (who previously owned 25% of the Debtor-Acis).<sup>30</sup> The court concludes that Neutra Cayman has standing to object to the Plan,

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<sup>30</sup> The court is repeatedly referring to the Debtor-Acis but, to be clear, there are two consolidated Debtors: Acis Capital Management, L.P. (“Acis LP”) and Acis Capital Management GP, LLC (“Acis GP/LLC”). See note 2, *supra*. When Acis LP was first formed, it was owned by one general partner (Acis GP/LLC, with a .1% interest) and it had three limited partners: (a) the Dugaboy Investment Trust (a Dondero family trust of which either Mr. Dondero or his sister, Nancy Dondero, have been the trustee at all relevant times) with a 59.9% interest; (b) Mr. Terry with a 25% interest; and (c) Mr. Akada with a 15% interest. When Acis GP/LLC was formed (*i.e.*, the .1% owner of Acis LP), its sole member was the Dugaboy Investment Trust. After Mr. Terry was terminated by Highland, his 25% limited partnership interest in Acis LP was forfeited and divided among the two remaining limited partners: Mr. Akada (increasing his interest by 10% up to 25%), and the Dugaboy Investment Trust (increasing its interest by 15% up to 74.9%). But, most importantly, on the day after entry of Mr. Terry’s Final Judgment (*i.e.*, on December 18, 2017), both Mr. Akada and the Dugaboy Investment Trust conveyed their entire limited partnership interests in Acis LP—25% and 74.9%, respectively—to Neutra Cayman. The Dugaboy Investment Trust also conveyed its 100% membership interest in Acis GP/LLC to Neutra Cayman.



since it is an equity owner of the Debtors (albeit only having acquired its equity about a month before the bankruptcy). As with HCLOF Guernsey, the court also concludes that Neutra-Cayman is absolutely, beyond any reasonable doubt, controlled by Highland, as explained further below.

## **V. The Plan.**

The Plan is fairly simple, considering the complexity of the business and the relationships, and the contentiousness of the Bankruptcy Cases. Again, there aren't many creditors.

The Plan proposes<sup>31</sup> that the Debtor-Acis, as a "Reorganized Debtor," will continue with the business operations of the Debtors after the Effective Date<sup>32</sup> of the Plan. Specifically, the Debtor-Acis will assume, pursuant to section 365 of the Bankruptcy Code, its CLO PMAs and continue to serve as the portfolio manager to the CLO SPEs (and as to any resets of the CLOs therein). The Reorganized Debtor will continue to earn fees and will pay claims from post-Effective Date income as provided in the Plan. The Reorganized Acis will actively pursue additional fund management contracts. Again, there is no objection by the CLO SPEs to the Plan, and the indenture trustee on the tranches of CLO notes has no objection.

Mr. Terry (again, the former human manager of the Debtor-Acis and also the largest creditor) shall receive 100% of the equity interests in the Reorganized Debtor, in exchange for a negotiated \$1 million reduction in his partially secured claim.<sup>33</sup> The remainder of his claim will

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<sup>31</sup> This is merely a high-level summary of the Plan. The Plan terms, as modified, shall in all ways govern, not this summary.

<sup>32</sup> The "Effective Date" is defined, essentially, as the first business day which is fourteen (14) days after entry of an order confirming the Plan, if the confirmation order is not stayed.

<sup>33</sup> Mr. Terry has asserted partial secured status as to his claim in the proofs of claim he has filed in these cases. The Chapter 11 Trustee credibly testified that there was no other logical party to take the equity of



be treated as an unsecured claim. Each unsecured creditor will receive on the Plan Effective Date an unsecured cash flow note in the full amount of its claim, which notes will mature three years after the Effective Date of the Plan, with equal quarterly payments of principal and interest, at 5% interest per annum. These cash flow notes are expected to yield payment in full (actually 102%) to the unsecured creditors.<sup>34</sup>

As for the sub-advisory and shared services agreements with Highland, as noted earlier, the Chapter 11 Trustee, with bankruptcy court approval, has already (as of August 2018) rejected these during the Bankruptcy Cases, pursuant to section 365 of the Bankruptcy Code. The Chapter 11 Trustee caused the Debtor-Acis to subsequently contract, with bankruptcy court approval, with a different entity, Brigade Capital Management, L.P. (“Brigade”), to provide the sub-advisory and shared services going forward, for a minimum two-year term (unless the Reorganized Debtor and Brigade otherwise agree), at a much cheaper cost than Highland.<sup>35</sup> Thus, Brigade will provide sub-servicing and sub-advisory services to the Reorganized Debtor.

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the Reorganized Debtor, at this juncture, and that he had negotiated this reduction to Mr. Terry’s secured claim, and he thought it was justified by the circumstances of this case. While the Objectors have argued that the secured status of Mr. Terry’s claim may be subject to challenge under section 547(b) of the Bankruptcy Code, section 547(b) is discretionary (*e.g.*, a “trustee may avoid any transfer” that might be avoidable as a preference). The Chapter 11 Trustee credibly emphasized that this was negotiated treatment of an asserted secured claim, and he had no “exclusivity” on proposing a plan if someone else had wanted to propose something different. Transcript 12/11/18 (AM) [DE # 789], at p. 70 (line 3) through p. 71 (line 2).

<sup>34</sup> Insider claims—namely Highland—are separately classified from general unsecured claims under the Plan. To the extent such claims are ultimately allowed (after any allowed defenses and offsets), and to the extent such claims are not equitably subordinated by Bankruptcy Court adjudication, these claims will receive the same treatment as other general unsecured claims (cash flow notes). To the extent any of these claims are ultimately allowed but equitably subordinated, they will receive subordinated promissory notes, accruing interest at 5% per annum, that will not be payable until all non-subordinated claims have been paid in full (they will have maturity dates to occur on the earlier of: (i) the date that is two years after the date all Unsecured Cash Flow Notes have been paid in full, or (ii) five years after the Effective Date). The expected recovery under the Plan for the insider claims is from 65% to 100%.

<sup>35</sup> An entity named Cortland Capital Markets Services LLC (“Cortland”) is actually providing some of the back-office shared services agreement type functions.

As for the Equity/ALF PMA, it is not an agreement with the Debtor-Acis anymore to either be assumed or rejected, pursuant to section 365. However, in the Highland Entities Adversary Proceeding, the Chapter 11 Trustee seeks to avoid the termination of the Equity/ALF PMA. Pursuant to the Plan, the Reorganized Debtor will be vested with certain Assets of the Debtors, including Estate Claims and Estate Defenses, to be administered and liquidated by the Reorganized Debtor.

1. The Highland Entities Adversary Proceeding (Adv. Proc. No. 18-03212).

Suffice it to say that the Highland Entities Adversary Proceeding is a somewhat significant part of the Plan; it is what justifies the temporary injunction that is a critical part of the Plan. With regard to the Highland Entities Adversary Proceeding, the Defendants in it (there are five of them) are: (i) Highland; (ii) HCLOF Guernsey; (iii) Highland HCF (*i.e.*, the Cayman Island entity that was recently formed to essentially replace the Debtor-Acis under the Equity/ALF PMA); (iv) Highland CLO Management, Ltd. (“Highland Management”) (an entity registered in the Cayman Islands on October 27, 2017—seven days after Mr. Terry’s Arbitration Award); and (v) Highland CLO Holdings, Ltd. (yet another entity incorporated in the Cayman Island on October 27, 2017). The Highland Entities Adversary Proceeding is essentially a multi-faceted fraudulent transfer action. The statutory predicates for the relief sought are sections 502, 542, 544, 547, 548, and 550 of the Bankruptcy Code and Texas Business & Commerce Code § 24.001 et seq. (“TUFTA”).

Distilled to its essence, the Highland Entities Adversary Proceeding argues that Highland, along with its related Co-Defendants, ***orchestrated a systematic transfer of value away from the Debtor-Acis to other Highland entities*** (all of those transferee-entities are offshore entities—whereas the Debtor-Acis is a Delaware entity), beginning almost immediately after Mr. Terry

was terminated in June 2016, and continuing on during Mr. Terry's litigation/arbitration with the Debtor-Acis, and then rapidly unfolding after the Arbitration Award. This was allegedly done to denude the Debtor-Acis of value and make the Debtors "judgment proof." This was allegedly also done to ensure that the Debtor-Acis's very valuable business as portfolio manager would be taken over by other Highland entities and remain under Highland's and Mr. Dondero's control.<sup>36</sup>

The evidence is rather startling on this point. Among other things, pursuant to amendments made to the Debtor-Acis's Sub-Advisory Agreement and Shared Services Agreements with Highland, starting soon after Mr. Terry was terminated, the fees owed by the Debtor-Acis to Highland under these agreements shot up to an enormously higher level. Then, in April 2017, a new CLO was issued (or actually a former Acis CLO was reset) and a new Highland-affiliated Cayman Island entity was ultimately put in place to manage it instead of the Debtor-Acis (even though the Debtor-Acis managed all other CLOs in the Highland corporate empire). Numerous other transactions were undertaken through the Fall of 2017, removing assets and agreements away from the Debtor-Acis. For example, a multi-million dollar note receivable owed to the Debtor-Acis by Highland was transferred out of the Debtor-Acis,<sup>37</sup> and

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<sup>36</sup> Exh. 627.

<sup>37</sup> On November 3, 2017, the Debtor-Acis, Highland, and Highland Management (a newly created, offshore Highland affiliate) entered into that certain Agreement for Assignment and Transfer of Promissory Note (the "Note Assignment and Transfer Agreement"). Exh. 225. The Note Assignment and Transfer Agreement, among other things, transferred a \$9.5 million principal amount promissory note executed by Highland and payable to the Debtor-Acis (the "Note"), Exh. 218, from the Debtor-Acis to Highland Management (the "Note Transfer"). The Assignment and Transfer Agreement memorializing this transaction is signed by Mr. Dondero for the Debtor-Acis. The document recites that (i) Highland is no longer willing to continue providing support services to the Debtor-Acis, (ii) the Debtor-Acis, therefore, can no longer fulfill its duties as a collateral manager, and (iii) Highland Management agrees to step into the collateral manager role if the Debtor-Acis will assign the Note to it. Notably, Highland Management was registered in the Cayman Islands on October 27, 2017, roughly a week before the Note Transfer. Thus, Highland Management had no portfolio or collateral management experience whatsoever when it entered the Assignment and Transfer Agreement. To the contrary, it appears Highland Management was an entity that was created specifically to hold the Note and eventually take possession of the CLO PMAs in an international forum that would be difficult for Mr. Terry to reach. The Debtor-

shares in HCLOF Guernsey held by the Debtor-Acis were sold back to HCLOF Guernsey (four days after the Arbitration Award). And then the Equity/ALF PMA was terminated so that the Debtor-Acis would no longer have management-control over HCLOF Guernsey as its portfolio manager—arguably putting Highland in a position to liquidate the Acis CLOs and put the Debtor-Acis out of business. Specifically, on October 27, 2017, just seven days after Mr. Terry's Arbitration Award, the Debtor-Acis ostensibly terminated its own portfolio management rights under the Equity/ALF PMA<sup>38</sup> and transferred its authority and its valuable portfolio management rights—for no value—to Highland HCF, an affiliate of Highland. It appears that the only alleged consideration for these transfers, to the extent there was any, was the satisfaction of purported debts owed to other Highland entities or their representatives.

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Acis appears to have received no or insufficient consideration for the Note Transfer. The primary consideration for the Note Transfer was an alleged payable due from the Debtor-Acis to Highland in the approximate amount of \$7.5 million for participation fees, which was transferred to Highland Management shortly before the Note Assignment and Transfer Agreement was entered. The validity of the alleged “participation fees” is unknown. The remainder of the consideration for the Note Transfer is a promise to pay certain expenses of the Debtor-Acis, which has apparently never occurred. In any event, it appears highly likely that the Note Transfer took away the Note as an asset from which Mr. Terry could collect his judgment.

<sup>38</sup> As mentioned earlier, the Equity/ALF PMA provided that the Debtor-Acis could only be removed as portfolio manager by the equity owner (now known as HCLOF Guernsey) “*for cause*” at § 14(a)-(e). Exh. 11. Meanwhile, the Debtor-Acis could terminate the Equity/ALF PMA without cause upon at least ninety (90) days’ notice, pursuant to § 13(a)-(c). Exh. 11. It would appear that these terms were wholly ignored by the persons orchestrating the Equity/ALF PMA termination. It appears that the Debtor-Acis was simply manipulated to consent and agree to its removal and replacement as portfolio manager of HCLOF Guernsey. This transfer of the Debtor-Acis’s portfolio management rights to the offshore entity Highland HCF was accomplished by way of a new portfolio management agreement entered into by the equity owner (now known as HCLOF Guernsey) and Highland HCF on October 27, 2017, which empowered Highland HCF with the same broad authority to direct the management of HCLOF Guernsey as was previously held by the Debtor-Acis LP under the Equity/ALF PMA. *See* Exh. 19, October 27, 2017 PMA §§ 1 & 5(a)-(q). This agreement appears to have been further solidified in a second portfolio management agreement dated November 15, 2017. Exh. 215. The Debtor-Acis received no consideration for this transfer.

The Highland Defendants argue that the Equity/ALF PMA (its termination being arguably the most significant transfer referenced in the Highland Entities Adversary Proceeding) did not have value. But the evidence convinces the court that it absolutely did. A witness, Mr. Zachary Alpern, credibly testified that the portfolio manager (under the Equity/ALF PMA) made decisions regarding the underlying financial instruments including seeking an optional redemption and negotiating a reset. Mr. Alpern also credibly testified about the importance, in the CLO industry, of the portfolio manager having control of a CLO's equity to ensure an "evergreen fee stream."<sup>39</sup> Additionally, Mr. Terry also credibly testified that the portfolio manager (not the CLO equity interest holder) has the right to control the terms of the liquidation of collateral in an optional redemption under the terms of the indentures.<sup>40</sup> The Chapter 11 Trustee also credibly testified that the Equity/ALF PMA allowed the Debtor-Acis to have control of an optional redemption.<sup>41</sup> Finally, a witness, Mr. Klein, credibly testified about the value of the Equity/ALF PMA and the negative impact of its transfer on the Debtor-Acis LP.<sup>42</sup>

To be clear, Highland and HCLOF Guernsey have argued in opposition to the Chapter 11 Trustee's position that it is HCLOF Guernsey—the actual equity holder of the CLO SPEs—that had/has the absolute power and authority to control the CLO SPEs' destinies and it is ludicrous to suggest otherwise. However, not only does the Equity/ALF PMA appear to this court to have delegated the relevant power and authority *to the Debtor-Acis*, but Highland's own expert on this

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<sup>39</sup> Exh. 404, Transcript 8/23/18 (AM) at pp. 65-67, 81-93 and Transcript 8/23/18 (PM) at pp. 34-35, 38-40, 46, and 49.

<sup>40</sup> Transcript 12/18/18 [DE # 804], at pp. 77-78. *See also* Exh. 405, Transcript 8/27/18 (AM) at pp. 63-75.

<sup>41</sup> Exh. 405, Transcript 8/27/18 (AM) at p. 53.

<sup>42</sup> Exh. 405, Transcript 8/27/18 (PM) at pp. 143-144, 147-159 and 205-207.

topic, Mr. Castro, testified that the “actual humans” who would make the decision for HCLOF Guernsey as to whether to request an optional redemption of the Acis CLOs were not the HCLOF Guernsey directors but, rather, Highland executives Mr. Dondero, Mr. Okada, and Highland employee Mr. Covitz (acting for Highland HCF).<sup>43</sup> Moreover, Mr. Alpern credibly testified that, before the Terry Arbitration Award, the Debtor-Acis, as the portfolio manager under the Equity/ALF PMA, rather than the HCLOF Guernsey’s directors, issued the notices of optional redemption for HCLOF Guernsey.<sup>44</sup>

The court concludes that the Chapter 11 Trustee has demonstrated a likelihood of success on the merits with regard to his claims set forth in the Highland Entities Adversary Proceeding. Therefore, the Temporary Injunction that is part of the Plan is supportable (as further explained below). Of course, the nature and extent of the rights ultimately recovered by the Debtor-Acis will either be determined in the Highland Entities Adversary Proceeding or, as HCLOF Guernsey’s own Guernsey expert conceded, in a binding arbitration in Dallas, Texas under the terms of the Equity/ALF PMA.<sup>45</sup>

## 2. The Plan Injunction.

The most controversial aspect of the Plan—the aspect of it that seems to be the primary focus of the Objectors—is a *portion* of an injunction in the Plan (the “Temporary Injunction”). The Temporary Injunction would *temporarily* enjoin the following parties *from effectuating an optional redemption or liquidating the Acis CLOs* and related actions: (i) Highland; (ii) HCLOF

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<sup>43</sup> Exh. 406, Transcript 8/28/18 (PM) at pp. 61-63.

<sup>44</sup> Exh. 404, Transcript 8/23/18 (AM) at pp. 85-89 and Exhs. 323-325 (Notices of Optional Redemption signed by the Debtor-Acis as portfolio manager of HCLOF).

<sup>45</sup> Transcript 12/13/18 (PM) [DE #794], at pp. 116, 118-19, 122, 124 (Corfield); *see also*, p. 140 (McGuffin).

Guernsey; (iii) CLO Holdco, Ltd. (the donor advised fund, seeded with Highland contributions and managed by Highland that owns 49% of HCLOF Guernsey); (iv) Neutra Cayman; (v) Highland HCF (the Cayman Island entity created shortly before the Bankruptcy Cases to replace the Debtor-Acis under the Equity/ALF PMA); (vi) Highland Management (the Highland-created entity that entered into a portfolio management agreement with a new Acis-CLO that was established in 2017); and (vii) any affiliates of Highland and their respective employees, agents, representatives, transferees, assigns, and successors.<sup>46</sup> This Temporary Injunction is proposed to only last until the earlier of when: (a) the creditors of the Debtors are paid in full; (b) resolution of the Highland Entities Adversary Proceeding; (c) a material breach in the Plan; or (d) the bankruptcy court terminates the Temporary Injunction upon request of a party-in-interest. ***Fully consensual resets of the Acis CLOs are permissible if HCLOF Guernsey, as the equity owner in the CLO SPEs, chooses to agree to resets.*** The basis for the Temporary Injunction is as follows: The Chapter 11 Trustee has asserted numerous claims in the Highland Entities Adversary Proceeding against Highland, HCLOF Guernsey, and affiliates, including claims to recover the Debtor-Acis's rights under the Equity/ALF PMA.<sup>47</sup> The Temporary Plan Injunction essentially provides for the continuation, after the Effective Date, of injunctive relief that the bankruptcy court previously granted in its Preliminary Injunction Order (the "Preliminary Injunction") [DE # 21 in Adversary No. 18-03212-sgj] entered on July 10, 2018 in the Highland Entities Adversary Proceeding. The Preliminary Injunction was originally set to expire by its

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<sup>46</sup> There is another portion of this Plan injunction that is more of a general plan injunction (*i.e.*, very typical) that would prohibit actions against the Debtors, Reorganized Debtor and the Estate Assets, based on acts occurring before the Effective Date, which would be permanent and would not expire upon the occurrence of any event that causes the Temporary Plan Injunction to expire.

<sup>47</sup> See Exh. 627, Trustee's Counterclaims and Claim Objection.



own terms upon confirmation of the Plan but would be extended pursuant to an order confirming the Plan, through the Effective Date of the Plan.

As the Fifth Circuit has stated, the four elements to justify a preliminary injunction are (a) substantial likelihood of success on the merits; (b) substantial threat that the plaintiff will suffer irreparable injury; (c) the threatened injury outweighs any harm the injunction might cause the defendant; and (d) the injunction is in the public interest.<sup>48</sup> Each element is present in these cases.

*Immediate and Irreparable Harm.* The court finds and concludes that the Temporary Injunction is legally permissible, necessary, and appropriate to avoid immediate and irreparable harm to the Reorganized Debtor (*i.e.*, evisceration of the Acis CLOs, by parties with unclean hands, that would have no authority to effectuate a liquidation of the CLOs, absent the prepetition wrongful termination of the Equity/ALF PMA). Mr. Scott, a director of HCLOF Guernsey, testified that, absent the Temporary Plan Injunction, HCLOF Guernsey would call for an optional redemption of the Acis CLOs.<sup>49</sup> The testimony of Ms. Bestwick, the other director of HCLOF Guernsey, also implied that, when the injunction expires, HCLOF Guernsey would redeem the Acis CLOs so that they could once again be managed by Highland.<sup>50</sup> The Chapter 11 Trustee credibly testified that if the Acis CLOs are liquidated, there is nothing for the Debtor-Acis to manage.<sup>51</sup> The Chapter 11 Trustee credibly testified that the Temporary Plan Injunction

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<sup>48</sup> *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009); *Women's Med. Ctr. of N.W. Houston v. Bell*, 248 F.3d 411, 419 n.15 (5th Cir. 2001); *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998).

<sup>49</sup> Exh. 721, Mr. Scott Depo. at pp. 204.

<sup>50</sup> Exh. 719, Bestwick Depo. at p. 112.

<sup>51</sup> Exh. 405, Transcript 8/27/18 (AM) at p. 40.



is very important because it protects the revenues under the Acis PMAs, which is a source of potential recovery to creditors under the Plan.<sup>52</sup> Mr. Terry credibly testified that the Temporary Plan Injunction is a critical component of the Plan and that the Debtor-Acis would have no going concern value without it. In fact, without the Plan Injunction, Mr. Terry will be precluded from reorganizing the business and paying creditors.<sup>53</sup>

The Objectors have argued that the Chapter 11 Trustee cannot suffer irreparable harm because he has an adequate remedy at law. This argument misses the mark. The destruction of the Debtors' ongoing business, which has the potential to repay creditors under the Plan in two years, constitutes irreparable harm. The fact that the estate possesses a number of avoidance claims for damages against Highland and its affiliates, and could potentially obtain damages on such claims, does not render the destruction of the Debtor-Acis's ongoing business any less harmful. Indeed, according to the Fifth Circuit:

[T]he mere fact that economic damages may be available does not always mean that a remedy at law is 'adequate.' For example, some courts have found that a remedy at law is inadequate if legal redress may be obtained only by pursuing a multiplicity of actions.<sup>54</sup>

*Likelihood of Success on the Merits.* The Chapter 11 Trustee has also demonstrated a likelihood of succeeding on the merits in the Highland Entities Adversary Proceeding.

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<sup>52</sup> Transcript 12/11/18 (AM) [DE # 789], at pp. 71-72.

<sup>53</sup> Transcript 12/12/18 (AM) [DE # 791], at pp. 40-41, 54-55.

<sup>54</sup> *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011) (citing *Lee v. Bickell*, 292 U.S. 415, 421 (1934) ("we are not in doubt, the multiplicity of actions necessary for redress at law [is] sufficient . . . to uphold the remedy by injunction.")).

The record contains substantial evidence of both intentional and constructive fraudulent transfers with regard to the Equity/ALF PMA and other assets.<sup>55</sup> The numerous prepetition transfers that occurred around the time of and after the Terry Arbitration Award appear more likely than not to have been made to deprive the Debtor-Acis of value and with actual intent to hinder, delay or defraud the Debtors' creditors. Highland's only purported business justifications for the prepetition transfers were that the Passive Investor demanded it and that the Debtor-Acis's brand was toxic in the market place.<sup>56</sup> However, these business justifications were not supported (and, in fact, were contradicted) by the evidence.

Indeed, while representatives of Highland and its affiliates said that the Passive Investor's demands were the reason for the termination (*i.e.*, essentially a "transfer") of the Equity/ALF PMA, the Passive Investor's representative testified that this was untrue and that these alleged demands were never made by the Passive Investor.<sup>57</sup> In fact, the Passive Investor was just that—a passive, minority investor in HCLOF Guernsey with no ability to influence or control any of

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<sup>55</sup> *E.g.*, Exh. 22, Transcript 2/6/18 at pp. 82-109, 130, 202-244, and the exhibits discussed therein; Exh. 201, Transcript 3/21/18 at pp. 110-133 & 186-191; Exh. 24, Transcript 3/22/18 at pp. 71-75 & pp. 204-205; Transcript 12/11/18 [DE # 789], at pp. 52-56; *see also* Transcript 8/27/18 (AM) [DE # 552], at p. 52; Transcript 12/12/18 (PM) [DE # 792], at pp. 92-98;

<sup>56</sup> Highland General Counsel Scott Ellington testified that the Passive Investor said it had no interest in doing business with the Debtor-Acis because the Debtor-Acis brand was purportedly toxic and, consequently, nothing associated with the Debtor-Acis could be managed or marketed as a CLO. Exh. 23, Transcript 2/7/18 at pp. 55-58. Mr. Ellington further testified that the Passive Investor demanded that the Equity/ALF PMA be transferred. Exh. 23, Transcript 2/7/18 at pp. 203-204. Mr. Ellington also testified that, because the Passive Investor would be putting in additional capital in connection with any reset CLOs, it had the ability to "start calling the shots" and dictate the terms of any reset transactions. Exh. 23, Transcript 2/7/18 at p. 226. Additionally, Highland executive Mark Okada testified that a reset transaction could not be performed by the Debtor-Acis because the market would not accept the Debtor-Acis as a portfolio manager and the Debtor-Acis was no longer risk-retention compliant. Exh. 25, Transcript 3/23/18 at p. 53. Additionally, Mr. Dondero testified that the "Boston investor" deal was contingent on getting away from the Debtor-Acis and getting a new collateral manager. Exh. 25, Transcript 3/23/18 at pp. 143-144.

<sup>57</sup> *See* Exh. 720 and excerpts read in to the trial record on 12/11/18 (PM) at pp. 149-157.

the actual investment decisions.<sup>58</sup> The only other business justification Highland and HCLOF Guernsey have suggested for the prepetition transfers was that the Debtor-Acis “was a shell” and not capable of being risk retention compliant.<sup>59</sup> However, Highland portfolio manager Hunter Covitz testified that in October 2017, prior to the Terry Arbitration Award, there was a structure in place that would comply with risk retention.<sup>60</sup> Mr. Covitz could not convincingly distinguish why the “shell” status of the Debtor-Acis was distinguishable from the “shell” status of other Highland-related entities that were the recipients of various fraudulent transfers.<sup>61</sup> Mr. Covitz also subsequently admitted that the Passive Investor did not request that the Debtor-Acis end its involvement with HCLOF Guernsey through the Equity/ALF PMA fraudulent transfer or request that ALF change its name to HCLOF [Guernsey].<sup>62</sup> Mr. Covitz’s testimony contradicted the testimony provided by Scott Ellington, General Counsel<sup>63</sup> and Mr. Dondero.<sup>64</sup> And, at bottom, if the Debtor-Acis was a thinly capitalized “shell,” it appears to be only because Highland systematically made it that way after the Terry Arbitration Award.

The evidence established overwhelmingly that there is a substantial likelihood that the transfers were part of an intentional scheme to keep assets away from Mr. Terry as a creditor. Highland put on an expert, Mr. Greenspan, who testified that he did not consider whether the

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<sup>58</sup> Exh. 720, Depo. of Passive Investor representative at pp. 32-33.

<sup>59</sup> Transcript 12/13/18 (AM) [DE # 793], at pp. 55-58.

<sup>60</sup> Transcript 12/13/18 (AM) [DE # 793], at pp. 77-78.

<sup>61</sup> Transcript 12/13/18 (AM) [DE # 793], at p. 78; Transcript 12/18/18 [DE # 804], at pp. 59-63.

<sup>62</sup> Transcript 12/13/18 (AM) [DE # 793], at p. 103.

<sup>63</sup> See Exh. 23, Transcript 2/7/18 at pp. 177-178.

<sup>64</sup> See Ex. 25, Transcript 3/23/28 at pp. 143-44.

Equity/ALF PMA transfer was an “actual” fraudulent transfer, but only considered whether the transfer was “constructively” fraudulent.<sup>65</sup> While Highland has taken the position that termination of the Equity/ALF PMA was not a transfer, Mr. Greenspan testified that the termination of a contract can constitute a transfer and acknowledged that the definition of a transfer in the Bankruptcy Code does not include a value component.<sup>66</sup>

*Balance of Harms.* The Chapter 11 Trustee has also shown the balance of harms weighs in his and the estates’ favor in granting the Plan’s Temporary Injunction. The Chapter 11 Trustee is entitled to the Temporary Injunction pending resolution of the claims asserted in the Highland Entities Adversary Proceeding. The Chapter 11 Trustee credibly testified that the Temporary Plan Injunction is important to the Plan, because it allows the cash flow from the CLO management to be collected by the Reorganized Debtor, and that is the source of revenue available at this time to pay creditors.<sup>67</sup> Mr. Terry also credibly testified that the Temporary Plan Injunction is a critical component of the Plan necessary to preserve the Debtors’ going concern value and allow the Reorganized Debtor to generate new business and repay creditors.<sup>68</sup> Conversely, in this court’s view, there is no real harm to Highland or the Co-Defendants because they can ask for a reset under the Plan.<sup>69</sup> Mr. Scott, a director of HCLOF Guernsey, testified that

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<sup>65</sup> Transcript 12/12/18 (PM) [DE # 792], at pp. 116-117 and 161.

<sup>66</sup> Transcript 12/12/18 (PM) [DE # 792], at pp. 92-98. Section 548(a)(1)(A) of the Bankruptcy Code only requires that a transfer be made with actual intent to hinder, delay or defraud creditors. In the context of an intentionally fraudulent transfer claim, questions of value are immaterial. 11 U.S.C. § 548(a)(1)(A). The definition of “transfer” under the Texas Uniform Fraudulent Transfer Act (“TUFTA”) also does not include a value component. Tex. Bus. & Comm. Code Ann. § 24.002(12) (West, Westlaw through 2017).

<sup>67</sup> Transcript 12/11/18 (AM) [DE # 789], at pp. 71-72.

<sup>68</sup> Transcript 12/12/18 (AM) [DE # 791], at pp. 40-41, 54-55.

<sup>69</sup> Transcript 12/11/18 (AM) [DE # 792], at p. 92.

HCLOF Guernsey can sell its interest in the subordinated notes in the market.<sup>70</sup> The Chapter 11 Trustee credibly testified that the Temporary Plan Injunction would not impair the value of the subordinated notes because a rational investor would not want to liquidate the Acis CLOs, but rather would acquire them to do a reset under the Plan.<sup>71</sup> Mr. Terry credibly testified that even if the Acis CLOs are not reset, it still does not make sense to redeem the Acis CLOs.<sup>72</sup>

*Public Interest.* Finally, issuance of the Plan Injunction is consistent with public policy. Public policy favors the equitable collecting of a debtor's assets, maximizing the value of those assets, and distributing the proceeds in an orderly fashion in accordance with the priorities and safeguards set forth in the Bankruptcy Code, rather than in an uncontrolled, piecemeal, and potentially wasteful way. Public policy also supports successful reorganizations.<sup>73</sup> The public interest is furthered by confirming a plan that saves the Debtor-Acis's business operations and allows it to pay its creditors under a successful plan of reorganization. The public interest is also furthered by maintaining the status quo through the Temporary Plan Injunction so that the avoidance action relating to the Equity ALF PMA can be determined on its merits. The public interest is not furthered by allowing potential wrongdoers to complete the last step in what appears likely to have been a scheme to strip the Debtor-Acis of its assets, steal its business, and leave it unable to pay creditors. The public interest is not furthered by leaving the Debtors

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<sup>70</sup> Exh. 721, Mr. Scott Depo. at p. 28.

<sup>71</sup> Transcript 12/11/18 (PM) [DE # 790], at pp. 23-24.

<sup>72</sup> Transcript 12/12/18 (AM) [DE #791], at p. 82.

<sup>73</sup> *Tex. Comptroller of Pub. Accounts v. Transtexas Gas Corp. (In re Transtexas Gas Corp.)*, 303 F.3d 571, 580 (5th Cir. 2002).

without sufficient resources to pursue and effectively litigate potentially valuable causes of action.

In sum, the court finds and concludes that the proposed Plan injunction (including the Temporary Injunction) is legally permissible and justified under all the circumstances. It is narrowly tailored to address the specific harm to which it is directed and comports with governing case and statutory authority and applicable rules of bankruptcy and civil procedure. The Plan Injunction is consistent with Fifth Circuit precedent.<sup>74</sup> Such an injunction would not violate section 524(e) of the Bankruptcy Code. That subsection provides that “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.”<sup>75</sup> The Plan Injunction would not affect the liability of any entity, or the liability of any property. The injunction would only temporarily prohibit Highland and its Co-Defendants from exercising one form of economic recourse, thereby preserving the status quo while the Chapter 11 Trustee and/or Reorganized Debtor has a fair opportunity to prosecute the

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<sup>74</sup> The Fifth Circuit, in an unpublished opinion, has recognized the propriety of an injunction to preserve the status quo in cases where equitable relief is sought. *See Animale Group v. Sunny’s Perfume, Inc.*, 256 F. App’x 707, 709 (5th Cir. 2007) (“Because Defendants seek equitable relief, the district court was authorized to preserve the status quo by entering a limited asset freeze.”). The Chapter 11 Trustee’s claims in the Highland Entities Adversary Proceeding to avoid fraudulent transfers seek equitable relief. *See United States ex rel. Rahmen v. Oncology Assocs., P.C.*, 198 F.3d 489, 498 (4th Cir. 1999) (“The complaint’s request to void transfers as fraudulent—a form of rescission—is also an equitable remedy.”); *Dong v. Miller*, No. 16-CV-5836 (NGG) (JO), 2018 U.S. Dist. LEXIS 48506, at \*30-31 (E.D.N.Y. Mar. 23, 2018) (“The setting-aside of a fraudulent conveyance is a form of equitable relief.”). *See also Iantosca v. Step Plan Servs.*, 604 F.3d 24, 33 (1st Cir. 2010) (affirming preliminary injunction where creditors had a “colorable claim that appellants’ own supposed interest under the settlement rests upon a fraudulent conveyance”); *Seidel v. Warner (In re Atlas Fin. Mortg., Inc.)*, Adv. No. 13-03222, 2014 Bankr. LEXIS 140 at \*10 (Bankr. N.D. Tex. Jan. 14, 2014) (granting preliminary injunction where complaint sought avoidance of fraudulent transfers under the Bankruptcy Code and the Texas Uniform Fraudulent Conveyance Act); *Paradigm Biodevices, Inc. v. Centinel Spine, Inc.*, No. 11 Civ. 3489 (JMF), 2013 U.S. Dist. LEXIS 66858, at \*7 (S.D.N.Y. May 9, 2013) (authority to grant preliminary injunction existed because plaintiff alleged not only a legal claim for money damages, but also an equitable claim to avoid fraudulently transferred assets).

<sup>75</sup> 11 U.S.C. § 524(e).

Highland Entities Adversary Proceeding.<sup>76</sup> Likewise, the proposed injunction does not contravene any other provision of the Bankruptcy Code or the Bankruptcy Rules.<sup>77</sup> Finally, the Chapter 11 Trustee’s avoidance claim relating to the Equity/ALF PMA transfer under TUFTA also provides a statutory basis for injunctive relief.<sup>78</sup>

3. Feasibility of the Plan—Specific Findings and Conclusions Regarding Mr. Terry and Brigade.

The Objectors have challenged the feasibility of the Plan.<sup>79</sup> The court finds and concludes that the preponderance of the evidence supported the feasibility of the Plan. Among other things, the Chapter 11 Trustee credibly testified that Mr. Terry has an excellent track record as a portfolio manager, and that there is no reason why Mr. Terry will not be able to obtain new business—that is, new portfolios to manage which will provide additional revenue streams for the Reorganized Debtor.<sup>80</sup> The evidence was credible and compelling that Mr. Terry

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<sup>76</sup> See *In re Seatco, Inc.*, 259 B.R. 279, 283-84 (Bankr. N.D. Tex. 2001) (approving temporary injunction of suit against nondebtor on guaranty of debt treated in plan).

<sup>77</sup> Compare *Omni Mfg. v. Smith (In re Smith)*, 21 F.3d 660, 666-67 (5th Cir. 1994) (disapproving injunction extending time to file proof of claim beyond limits set in Bankruptcy Rules 3003(c)(3) and 9006(b)(1)); *Chiasson v. Binger (In re Oxford Mgmt.)*, 4 F.3d 1329, 1334 (5th Cir. 1993) (disapproving injunction ordering payment that altered distribution scheme set forth in § 726(b)); *Unites States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) (disapproving injunction ordering spousal support payments contrary to § 523(a)(5)).

<sup>78</sup> Tex. Bus. & Comm. Code Ann. § 24.008 (West, Westlaw through 2017) (providing a creditor may obtain “an injunction against further disposition by the debtor or the transferee, or both, of the asset transferred or of other property . . . [or] any other relief the circumstances may require.”). TUFTA’s injunction provision is construed broadly and courts have found that “[a] claim for fraudulent transfer under Texas law contemplates the issuance of a preliminary injunction.” *Sargeant v. Al Saleh*, 512 S.W.3d 399, 413 (Tex. App.—Corpus Christi 2016, no pet.); accord, *Janvey v Alguire*, 647 F.3d 585, 602-03 (5th Cir. 2011).

<sup>79</sup> 11 U.S.C. § 1129(a)(11).

<sup>80</sup> Transcript 12/11/18 (AM) [DE # 789], at p. 90 (lines 5-12). Moreover, to the extent there are any gaps, recoveries from the Highland Entities Adversary Proceeding might eventually be available for ongoing operations and payment of creditors.



will be capable of fulfilling the equity owner position in the Reorganized Debtor (stepping in to essentially run the Reorganized Debtor) and will be able to ensure the feasibility of the Plan. He is well qualified to reorganize the Debtor-Acis. Mr. Terry testified that his role with the Reorganized Debtor will be similar to the role he very successfully performed for the Debtor-Acis.<sup>81</sup> The Debtor-Acis received numerous awards during Mr. Terry's service as the portfolio manager of the Acis CLOs.<sup>82</sup> The arbitration panel that issued the Arbitration Award found that Mr. Terry was terminated for essentially doing the right thing for investors.<sup>83</sup> Mr. Terry credibly testified that numerous market participants have expressed an interest in working with the Reorganized Debtor if the Plan is confirmed.<sup>84</sup>

Moreover, the court finds and concludes that Brigade (who stepped in as sub-advisor in place of Highland during the Bankruptcy Cases and is a registered investment advisor) is qualified to serve as a sub-advisor to the Reorganized Acis. Mr. Jared Worman, a portfolio manager for Brigade,<sup>85</sup> credibly testified that Brigade, founded in the year 2007, currently has \$20 billion of total assets under management, \$5 billion of which consists of six U.S. CLOs, two U.S. CDOs, and three European CLOs.<sup>86</sup> Mr. Worman credibly testified that Brigade has issued 17 CLOs and has reset or refinanced several of them.<sup>87</sup> Mr. Worman and Mr. Terry credibly

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<sup>81</sup> Transcript 12/11/18 (PM) [DE # 790], at pp. 172-73.

<sup>82</sup> Transcript 12/11/18 (PM) [DE # 790], at pp. 162-163 and Exh. 752.

<sup>83</sup> Transcript 12/11/18 (PM) [DE # 790], at pp. 161-62.

<sup>84</sup> Transcript 12/12/18 (AM) [DE # 791], at pp. 16-18.

<sup>85</sup> Mr. Worman has an undergraduate degree from Emory University and an MBA from Wharton.

<sup>86</sup> Transcript 12/11/18 (PM) [DE # 790], at p. 84.

<sup>87</sup> Transcript 12/11/18 (PM) [DE # 790], at p. 86.



testified that Brigade is willing to serve as sub-advisor to the Reorganized Acis for fifteen basis points.<sup>88</sup> Highland attempted to show with evidence and argument that Brigade had made some failed trades since stepping in as sub-advisor to the Acis CLOs and that this perhaps made them unfit to serve in this role. But Mr. Terry credibly testified that the fact that a few failed trades were made by Brigade does not make them unfit to serve as sub-advisor to Reorganized Acis, and that trades out of compliance with the applicable CLO tests occasionally happen, and Brigade has handled them appropriately.<sup>89</sup> In fact, the evidence suggested that at least ten failed trades occurred while Highland was acting as sub-advisor to the Debtor-Acis.<sup>90</sup>

Highland's suggestions that Brigade is not up to the task to manage the Reorganized Debtor are specious. Likewise, HCLOF Guernsey's insistence that it will not be getting the benefit of its bargain if the Acis CLOs are not managed by Highland personnel going forward appears to be a manufactured position aimed at thwarting Mr. Terry at all costs. Not only is there no credible evidence of Brigade mismanagement but, to the contrary, it appears that Highland (prior to the Debtor-Acis's rejection of the Sub-Advisory Agreement and Shared Services Agreement), intentionally liquidated assets of the CLO SPEs and built up cash without reasonable justification. Specifically, Mr. Terry credibly testified that there were \$85 million in purchases in the Acis CLOs in the hours leading up to the entry of the orders for relief, but virtually no purchases of loans in the CLOs afterwards—only sales.<sup>91</sup> And Mr. Worman further

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<sup>88</sup> Transcript 12/11/18 (PM) [DE # 790], at p. 89; Transcript 12/12/18 (AM) [DE # 791], at p. 62.

<sup>89</sup> Transcript 12/11/18 (PM) [DE # 790], at pp. 182-83; Transcript 12/18/18 [DE # 804], at pp. 72-73.

<sup>90</sup> See Exhs. 727, 728; Transcript 12/11/18 (PM) [DE # 790], at pp. 71-74, 182-83.

<sup>91</sup> Transcript 12/12/18 (AM) [DE # 791], at pp. 18-19, 28-31; Transcript 12/18/18 [DE # 804], at pp. 87-89; *see also*, Terry Demonstrative.

credibly testified that Highland, while acting as sub-advisor, allowed approximately \$380 million in cash to build up in the Acis CLOs. Meanwhile, Brigade has subsequently reduced that cash balance by \$280 million to approximately \$100 million.<sup>92</sup> Mr. Worman also credibly testified that Brigade has purchased approximately \$300 million in loans for the Acis CLOs.<sup>93</sup> The Chapter 11 Trustee and Mr. Terry both credibly testified that the build-up of cash in the Acis CLOs while Highland was sub-advisor, rather than the loans acquired by Brigade, left the Acis CLOs without sufficient interest income to make a distribution to the equity holders.<sup>94</sup> Certain contradictory testimony of Hunter Covitz was not convincing that: (a) there were very few conforming loans available to be purchased for the Acis CLOs in the approximately four months that elapsed between the entry of the Order for Relief and the time when Highland was terminated as sub-advisor;<sup>95</sup> and (b) it made more sense to accumulate cash to pay down the AAA notes rather than invest in new loans.<sup>96</sup> The court found more convincing the testimony of Mr. Terry: (a) that there was \$310 billion of performing loans rated above CCC in the S&P loan index in May of 2018 available for purchase in CLO-6 that would have satisfied the weighted average life test;<sup>97</sup> (b) that Highland purchased loans for CLO-7 that would have satisfied the weighted average life constraints in the Debtor-Acis's CLO-4, CLO-5, and CLO-6;<sup>98</sup> and (c)

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<sup>92</sup> Transcript 12/11/18 (PM) [DE # 790], at p. 100.

<sup>93</sup> Transcript 12/11/18 (PM) [DE # 790], at pp. 70, 94.

<sup>94</sup> Transcript 12/11/18 (AM) [DE # 789], at pp. 67-69; Transcript 12/11/18 (PM) [DE # 790], at pp. 70-71; Transcript 12/12/18 (AM) [DE # 791] at pp. 34-37.

<sup>95</sup> Transcript 12/13/18 (AM) [DE # 793], at pp. 12-13.

<sup>96</sup> Transcript 12/13/18 (AM) [DE # 793], at pp. 13-16.

<sup>97</sup> Transcript 12/18/18 [DE # 804], at p. 87.

<sup>98</sup> Transcript 12/18/18 [DE # 804], at pp. 87-88.

that, although there was no change in market conditions, Highland essentially stopped buying collateral for the Acis CLOs<sup>99</sup> after the entry of the Orders for Relief.<sup>100</sup>

4. Resets—Non-impairment of Anyone’s Rights.

The Plan only contemplates *consensual* resets of the Acis CLOs—in other words, only if HCLOF Guernsey requests resets.<sup>101</sup> Messrs. Worman and Terry both credibly testified that they believed the Reorganized Acis and Brigade could perform a consensual reset of the Acis CLOs.<sup>102</sup> Mr. Terry credibly testified that other asset managers have been able to issue or reset CLOs after a bankruptcy proceeding.<sup>103</sup> Mr. Terry also credibly testified that he wants to come to a resolution with HCLOF Guernsey and consensually reset the Acis CLOs.<sup>104</sup>

HCLOF Guernsey has taken the position that it and its new Passive Investor (new as of mid-November 2017—just before the Bankruptcy Cases) only want to be involved with CLOs that are managed by Highland or Highland affiliates. Is the Plan impairing their rights—to the extent the Plan (and any subsequent re-sets) brings in Brigade as the sub-advisor to the Reorganized Debtor (whereas Highland was in that sub-advisor role before)? It appears no. The

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<sup>99</sup> Transcript 12/18/18 [DE # 804], at pp. 88-89.

<sup>100</sup> Highland has also argued that the Plan is not feasible because the administrative expense claims are extremely high (to which the Chapter 11 Trustee responds, it is of Highland’s making, since Highland has objected to literally every action proposed by the Chapter 11 Trustee). The court does not believe there is a legitimate feasibility problem here. Not only has the court not ruled yet on final professional fee applications, but the Chapter 11 Trustee represented that certain professionals have agreed to defer their fees (beyond payment in full on the Effective Date) as necessary.

<sup>101</sup> See Plan § 6.08.

<sup>102</sup> Transcript 12/11/18 (PM) [DE # 790], at pp. 86-90, 176-178; Transcript 12/12/18 (AM) [DE # 793], at pp. 16-18.

<sup>103</sup> Transcript 12/11/18 (PM) [DE # 790], at pp. 179-180.

<sup>104</sup> Transcript 12/18/18 [DE # 804], at p. 74.

Offering Memorandum between HCLOF Guernsey and the Passive Investor, dated November 15, 2017, pursuant to which the Passive Investor agreed to invest in HCLOF Guernsey, provided that there may be a change in circumstances following the date of the Offering Memorandum and that any forward-looking statements in the Offering Memorandum involved risks and uncertainties “because they relate to events and depend on circumstances that may or may not occur in the future.”<sup>105</sup> Heather Bestwick, one of the HCLOF Guernsey directors, testified that the Offering Memorandum does not require HCLOF Guernsey to invest only in Highland-managed funds<sup>106</sup> and instead expressly provides that HCLOF Guernsey will invest in “CLOs managed by other asset managers.”<sup>107</sup> Another witness, Mr. McGuffin, testified that the HCLOF Guernsey directors’ fiduciary duties require them to act independently and objectively in the best interests of HCLOF Guernsey, and also require them to consider a change in circumstances.<sup>108</sup> HCLOF Guernsey’s counsel, HCLOF Guernsey’s director, and the Passive Investor have all testified that they would consider doing a reset with the Reorganized Acis in the event the Plan is confirmed.<sup>109</sup>

Mr. Terry credibly testified that a reset of the Acis CLOs can occur after the expiration of the reinvestment periods of the Acis CLOs.<sup>110</sup> The Plan is feasible regardless of whether a reset of the Acis CLOs is requested by HCLOF Guernsey. Messrs. Phelan and Terry both credibly

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<sup>105</sup> See Exh. 90, HCLOF Guernsey Offering Memorandum, at pp. 4-5.

<sup>106</sup> See Exh. 719, Bestwick Depo., at pp. 109, 118-121.

<sup>107</sup> See Exh. 90, HCLOF Offering Memorandum, at p. 12.

<sup>108</sup> Transcript 12/13/18 (PM) [DE # 794], at pp. 142-145.

<sup>109</sup> See Exh. 602, p. 12 of 70 (statement by HCLOF Guernsey’s Counsel); Exh. 719 at pp. 166-167 (Heather Bestwick); Exh. 720, p. 72.

<sup>110</sup> Transcript 12/18/18 [DE # 804], at pp. 82-83.

testified that the Reorganized Debtor will have cash flow from multiple potential sources—including the revenues from the CLO PMAs with the Acis CLOs, potential new business developed by the Reorganized Acis, and the outcome of any potential litigation claims.<sup>111</sup>

## **VI. General Credibility Assessments.**

In ruling in a contested matter such as confirmation, and weighing the preponderance of the evidence, the credibility of witnesses and contradictions in their testimony naturally can be significant. Here, there were some noteworthy problems and contradictions with some of the testimony provided by the Objectors' witnesses. They are summarized below.

### **1. Scott Ellington: A Seemingly Manufactured Narrative to Justify Prior Actions.**

Scott Ellington testified on February 7, 2018 at the trial on the involuntary petitions, and the court was asked to consider his testimony again in connection with confirmation (he did not attend the confirmation hearing). He is the General Counsel, Chief Legal Officer, and a Partner at Highland. Mr. Ellington testified that the Debtor-Acis's name is "toxic" in the market place and that, due to the litigation with Mr. Terry and allegations in that litigation, "nothing can be associated with the Acis brand and be managed as a CLO or marketed as a CLO."<sup>112</sup> Mr. Ellington elaborated that it had been determined in late 2016 or 2017 that re-sets or re-financings of the Acis CLOs were a prudent thing to pursue (in fact, there was indeed a trend of refinancings and resets for this vintage of CLOs in the market place) and, in connection with that, the Debtor-Acis's contracts and assets needed to be diverted to different, newly created entities because: (a) the "Acis" name was toxic and underwriters and investors were not going to

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<sup>111</sup> Transcript 12/11/18 (AM) [DE # 789], at pp. 72, 88-90; Transcript 12/12/18 (AM) [DE # 791], at p. 53.

<sup>112</sup> Exh. 23, p. 55 (line 17) through p. 56 (line 7); p. 98 (lines 8-12).

be interested in re-financings or resets for CLOs managed by the Debtor-Acis;<sup>113</sup> and (b) the new Passive Investor wanted the Debtor-Acis out of the picture.<sup>114</sup> Mr. Ellington further elaborated: “The equity, you know, calls the tune, so to speak, in terms of the CLO . . .”<sup>115</sup> In summary, an overarching theme of Mr. Ellington’s testimony was that the Debtor-Acis was tainted or toxic in the marketplace and the Passive Investor wanted the Debtor-Acis out of the picture—thus, this was the motivation for the prepetition transactions orchestrated by Highland prior to the Bankruptcy Cases. The problems with the Scott Ellington testimony were at least two-fold. First, there is no credible evidence that the Debtor-Acis is/was toxic in the market place. In fact, in April 2017 (well after the litigation with Mr. Terry commenced), the Debtor-Acis issued a new CLO (CLO-7). And in market publications as recently as August 21, 2017, Highland was touting the *Acis* structure stating “our vehicle will allow us to issue between six and 12 CLOs over the next few years.”<sup>116</sup> Second, the Passive Investor denies demanding that the Debtor-Acis be removed as the CLO manager. Term sheets as recent as August 21, 2017 contemplated the Debtor-Acis as the continuing portfolio manager of CLOs, with apparently no protestations by the Passive Investor.<sup>117</sup>

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<sup>113</sup> *E.g., Id.* at p. 177 (line 21) though p. 178 (line 12); p. 184 (lines 13-17) (“The underwriters in this case, Mizuho, Goldman, et al., the equity, they said we want every possible relation to anything that could be legacy Acis or Acis-related affiliates to be severed”).

<sup>114</sup> *Id.* at p. 202 (lines 11-13) (“we have third-party investors that said we don’t want to be involved in this brand; and their equity is one of the reasons that new CLOs can be launched”); p. 203 (lines 7-8) (“It was call the deal and terminate the CMAs or transfer the CMAs”); p. 223 (lines 8-12) (“Because if the involuntary remains, and I’m just – I’m just being frank – we’ve already been told by equity holders, including the separate account, BBK, that you may have seen on some of the exhibits, they’re pulling everything.”).

<sup>115</sup> *Id.* at p. 74 (lines 3-6).

<sup>116</sup> Exh. 801, pp. 3 & 5.

<sup>117</sup> Exh. 802, p.1.

2. Michael Pugatch: The Passive Investor Made Into a Scapegoat.

The reality is that Highland, indeed, started working on the concept of doing resets of some of the older vintage Acis CLOs in at least early 2017 (and perhaps late 2016). Highland, in fact, completed a reset of one Acis CLO in April 2017 (with the Debtor-Acis still in place as the portfolio manager for that reset in April 2017). As part of that process of implementing resets for the Acis CLOs, Highland worked on bringing in a new investor or investors to have a share of the equity tranche of the Acis CLOs. Highland finally obtained the commitment of the Passive Investor in November 2017, after starting initial discussions with them in the second quarter of 2017.<sup>118</sup> A representative for the Passive Investor referred to itself as “passive” in a deposition.<sup>119</sup> Concepts and documentation for the Passive Investor’s investment in the Acis CLOs were discussed for a while during 2017. As recently as August 2017, the negotiations with the Passive Investor appeared to contemplate the Debtor-Acis still as the portfolio manager for the CLOs.<sup>120</sup> Then the arbitration trial with Mr. Terry began in September 2017 and the Terry Arbitration Award was issued on October 20, 2017. Suddenly, it appears that the dismantling of the Debtor-Acis began with all deliberate speed. The court believes, based on the totality of the evidence, that it was Highland who did not want the Debtor-Acis as CLO manager going forward, so that Highland could keep reaping the benefits of the reset CLOs. Specifically, when deposed on the topic, a representative for the Passive Investor, Mr. Pugatch, denied the accuracy of Mr. Ellington’s testimony, stating that the Passive Investor “viewed Acis and Highland as interchangeable from the perspective of the—you know, the actual investment

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<sup>118</sup> See Exh. 720, Pugatch Deposition Transcript dated November 27, 2018, p. 18, lines 14-20.

<sup>119</sup> *Id.* at p. 22 (lines 2-3) (“we’re you know, 49 percent sort of passive minority investor”).

<sup>120</sup> Exh. 802, p. 1.

opportunity.”<sup>121</sup> When asked, “Are you aware that Scott Ellington, general counsel for HCM, testified that [the Passive Investor] said with absolute certainty that they had no interest in doing business with Acis because the Acis brand was purportedly toxic and, consequently, nothing associated with Acis could be managed or marketed as a CLO?” Mr. Pugatch testified that he had read that testimony and that the statement was not true.<sup>122</sup> He further stated that “the ultimate sort of name change did not come from [the Passive Investor].”<sup>123</sup> In fact, when further asked whether the Passive Investor knew why Acis CLO Funding Limited changed its name to Highland CLO Funding Limited (*i.e.*, HCLOF Guernsey), Mr. Pugatch testified, “We were told that it was a change in the brand or the name, as requested by Highland.”<sup>124</sup> And when asked “Did [the Passive Investor] request that the name be changed?” he answered “No.”<sup>125</sup> When asked whether the Passive Investor considered “Acis toxic in the industry?” Mr. Pugatch answered: “No. What I would say is, when the suggested name change did occur, there were commercial reasons given to us as to why that would be beneficial in terms of the ongoing management of those CLOs and the intended investment thesis around the investment that we had made, which seemed to make commercial sense.”<sup>126</sup> When Mr. Pugatch was asked, “Those reasons were given by Highland, correct?” he replied “Correct” and confirmed that they were not demanded by the Passive Investor.<sup>127</sup> Mr. Pugatch was emphatic that the Passive Investor was

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<sup>121</sup> *Id.* at p. 30 (lines 19-20).

<sup>122</sup> *Id.* at p. 31 (lines 6-19).

<sup>123</sup> *Id.* (lines 24-25).

<sup>124</sup> *Id.* at p. 27 (lines 24-25).

<sup>125</sup> *Id.* at p. 28 (lines 1-3).

<sup>126</sup> *Id.* at p. 32 (lines 1-8).

<sup>127</sup> *Id.* at p. 32 (lines 9-12).



just that—a passive investor—that did not have the ability to “start calling the shots” and dictate the terms of any reset transactions.<sup>128</sup> When asked if the Passive Investor was concerned about the Terry Arbitration Award, Mr. Pugatch replied: “The award itself, no. I think the only thing we were concerned about or focused on was that vis-à-vis our equity investment in Highland CLO Funding Limited and, in turn, the equity that that vehicle held in the various CLOs was appropriately, you know, ring-fenced or not exposed to any potential damages or economic loss in value as a result of that arbitration award.”<sup>129</sup>

The Passive Investor further testified that Brigade has “a fine reputation in the market” but that it had no interaction with them historically.<sup>130</sup> The Passive Investor also testified that it was concerned about the cash buildups that had happened recently due to actions while Highland had still been the sub-advisor on the Acis CLOs.<sup>131</sup>

### 3. The Seemingly Rehearsed Testimony of the Two HCLOF Guernsey Witnesses.

The court was presented with video depositions of HCLOF Guernsey’s two non-executive directors (*i.e.*, its only directors): Mr. William Scott<sup>132</sup> and Ms. Heather Bestwick.<sup>133</sup> It was very apparent to the court that HCLOF Guernsey is controlled by Highland in every way. Putting things in the kindest way possible, Mr. Scott and Ms. Bestwick appear to be nominal figureheads who are paid to act like they are in charge, while they are not. They are both

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<sup>128</sup> *Id.* at p. 32 (lines 16-17); pp. 33-35.

<sup>129</sup> *Id.* at p. 43 (lines 3-9); p. 89.

<sup>130</sup> *Id.* at p. 68 (lines 11-13).

<sup>131</sup> *Id.* at p. 82, lines 9-24.

<sup>132</sup> *See* Exh. 721.

<sup>133</sup> *See* Exh. 719.

basically professional directors-for-hire, for companies that choose to form/organize in the nation of Guernsey.

Ms. Bestwick testified that she is a nonexecutive director for six companies in Guernsey (none of the others are in the CLO business).<sup>134</sup> She testified that she earned £35,000 per year to serve as a director of HCLOF Guernsey.<sup>135</sup> She testified that she was selected by Highland<sup>136</sup> and that Highland also made the decision to hire HCLOF Guernsey's law firm in the Bankruptcy Cases.<sup>137</sup> Ms. Bestwick, when questioned as to why the Equity/ALF PMA it had with the Debtor-Acis was terminated shortly after the Terry Arbitration Award was issued, testified that she was told it was "a condition precedent to the new Passive Investor" coming in and that she was told this by Highland.<sup>138</sup> She also testified that she had never talked to the Passive Investor (who, of course, is a 49% owner of HCLOF Guernsey)<sup>139</sup> or Grant Scott (the trustee of the charitable organization that owns 49% of HCLOF Guernsey).<sup>140</sup> She reiterated that she only talks to Highland employees. She also was under the impression that terminating the Equity/ALF PMA would improve marketability of the CLOs going forward but that it was the same people and "business as usual for us."<sup>141</sup> She testified that she learned of the Terry

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<sup>134</sup> *Id.* at pp. 7-8; p. 21 (line 5) through p. 22 (line 20); p. 26 (lines 10-12).

<sup>135</sup> *Id.* at p. 43 (lines 18-19).

<sup>136</sup> *Id.* at p. 42 (lines 17-25).

<sup>137</sup> *Id.* at p. 53 (lines 7-20).

<sup>138</sup> *Id.* at p. 16 (line 13) through p. 17 (line 23); p. 58 (line 21) through p. 60 (line 17).

<sup>139</sup> *Id.* at p. 188 (lines 12-15).

<sup>140</sup> *Id.* at p. 188 (line 19) through p. 189 (line 9).

<sup>141</sup> *Id.* at p. 189 (lines 12-15); p. 200 (line 22).

Arbitration Award in mid-April 2018 (some six months after the fact)<sup>142</sup> and “[y]ou’d have to ask Highland”<sup>143</sup> why it did not inform her sooner. Her testimony was clear that she defers to Highland on everything, stating that as directors they were “heavily reliant on our service providers, and that means Highland.”<sup>144</sup> With regard to a lawsuit that HCLOF Guernsey filed against Mr. Terry in Guernsey during the Bankruptcy Cases, she testified that it was neither her nor the other director, William Scott’s, idea.

Mr. Scott, the other HCLOF Guernsey director, is a “professional director” for 10-15 Guernsey companies<sup>145</sup>—all of which are “paying assignments.”<sup>146</sup> He became rather incensed when testifying, at the suggestion that he and Ms. Bestwick were not in control of HCLOF Guernsey, stating that board minutes and other documents would show that they took a great level of interest in running the company.<sup>147</sup> He testified that he earned £40,000 per year to serve as a director of HCLOF Guernsey and that, due to the extra work of the Bankruptcy Cases, he also was charging another £350 per hour, after the first 35 hours<sup>148</sup> (the court notes, anecdotally, that it required participation in court hearings by a director of HCLOF Guernsey each time that HCLOF Guernsey took a position in court). Mr. Scott confirmed that he was not aware of the litigation with Mr. Terry nor the Acis Bankruptcy Cases until April 2018.<sup>149</sup> He also testified

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<sup>142</sup> *Id.* at p. 61 (lines 3-19); p. 130 (line 14) through p. 136 (line 2).

<sup>143</sup> *Id.* at p. 137 (line 21).

<sup>144</sup> *Id.* at p. 152 (lines 18-19).

<sup>145</sup> *See* Exh. 721 at p 8 (line 9) through p. 9 (line 5); p. 79 (lines 20-25).

<sup>146</sup> *Id.* at p. 80 (lines 3-5).

<sup>147</sup> *Id.* at p. 13 (lines 1-12); p. 22 (line 23) through p. 23 (line 12).

<sup>148</sup> *Id.* at p. 80 (lines 6-18).

<sup>149</sup> *Id.* at p. 132 (line 20) through p. 135 (line 10).

that Highland had proposed the legal counsel HCLOF Guernsey used in the Bankruptcy Cases and that he had never disagreed with Highland's advice.<sup>150</sup> He confirmed that all investment decisions were made by Highland and that he and Ms. Bestwick's role was to "police" service providers.<sup>151</sup> Like Ms. Bestwick, Mr. Scott testified that they were told that the Passive Investor had made it a condition precedent to their investment in HCLOF Guernsey that "Acis depart."<sup>152</sup> But he had not talked to the Passive Investor.<sup>153</sup> As if all this deference to Highland were not enough, HCLOF Guernsey's lender is NexBank (an affiliate of Highland—which is based in Dallas, not Guernsey) and HCLOF Guernsey has given its actual equity notes to NexBank as security for its loans from NexBank.<sup>154</sup> Also, interestingly, when asked about the adversary proceeding that HCLOF Guernsey filed against the Chapter 11 Trustee a few months ago in the Bankruptcy Cases (*i.e.*, the Highland Entities Adversary Proceeding—it was originally commenced by Highland and HCLOF Guernsey as Plaintiffs), Mr. Scott testified that "we haven't sued the trustee, he has sued us" but later acknowledged his mistake when corrected by counsel.

This court is not naïve—it realizes that so-called "fiduciary services firms" are apparently a typical thing in the world of off-shore jurisdictions that are large financial centers.<sup>155</sup> Maybe

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<sup>150</sup> See generally *id.* at pp. 277-280.

<sup>151</sup> *Id.* at p. 106 (lines 1-7).

<sup>152</sup> *Id.* at p. 254 (line 20) through p. 260.

<sup>153</sup> *Id.* at p. 155 (lines 2-25).

<sup>154</sup> See Exh. 719 at p. 213 (line 2-22); Exh. 721 at p. 129 (line 10) through p. 130 (line 13).

<sup>155</sup> During the testimony of both Ms. Bestwick and Mr. Scott, the court was reminded of an old TV commercial in which an actor states, "I am not a doctor, but I play one on TV." The court could not help but conclude that these were not real directors but were playing them (when legally necessary).

the system works, for the most part and in many business contexts. But not when trying to convince a bankruptcy court of the bona fides of transactions that look like attempts to denude another party of value and/or to thwart creditors. And not when accusations are made that you are the alter ego of the party (Highland) who orchestrated the company's creation. The evidence was overwhelming that: (a) the HCLOF Guernsey Directors do whatever they are told to do by Highland; (b) they do not talk to anyone else but Highland; (c) they have never challenged Highland; (d) they let Highland pick and consult with their lawyers; and (e) they were not made aware by Highland of the Terry Arbitration Award, the Terry Judgment, the involuntary bankruptcy petitions, or pleadings that lawyers filed in the Bankruptcy Cases on HCLOF Guernsey's behalf.

In summary, the testimony of these two HCLOF Guernsey Directors was of little or no value in convincing the court that the Objector, HCLOF Guernsey, has valid concerns of its own (separate from Highland's) with regard to the bona fides of the Plan.

## **VII. Conclusion.**

This Bench Ruling and Memorandum Opinion is intended to address some of the most pertinent facts and issues raised in connection with confirmation of the Plan. Among other things, the court believed it was necessary to stress, in a separate ruling: (a) *the unique status of the Objectors* (they are "insiders" as defined in the Bankruptcy Code whose prepetition actions suggest unclean hands—this seems highly relevant to consider, when there are no non-insider creditors or other relevant parties objecting to the Plan); (b) *the appropriateness and legality of the proposed Plan Injunction* that would temporarily prevent nonconsensual redemptions/liquidations (it is in all ways justified given the allegations in the Highland Entities Adversary Proceeding and under the traditional four-prong test for preliminary injunctions); and

(c) *the feasibility of the Plan* (Mr. Terry and Brigade are well qualified to perform their contemplated roles).

The court will separately sign the Findings of Fact, Conclusions of Law and Order Confirming Plan submitted by the Chapter 11 Trustee to address all other relevant issues.

**#### End of Bench Ruling and Memorandum Opinion ####**

**Exhibit C**

**Acis Involuntary Opinion**



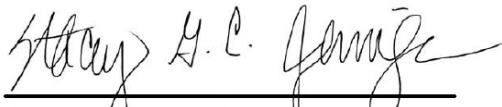
CLERK, U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

**ENTERED**

THE DATE OF ENTRY IS ON  
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed April 13, 2018

  
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>IN RE:</b>	§	
	§	
<b>ACIS CAPITAL MANAGEMENT, L.P.,</b>	§	<b>CASE NO. 18-30264-SGJ-7</b>
	§	
<b>Alleged Debtor.</b>	§	

<b>IN RE:</b>	§	
	§	
<b>ACIS CAPITAL MANAGEMENT GP, L.L.C.,</b>	§	<b>CASE NO. 18-30265-SGJ-7</b>
	§	
<b>Alleged Debtor.</b>	§	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF  
ORDERS FOR RELIEF ISSUED AFTER TRIAL ON  
CONTESTED INVOLUNTARY BANKRUPTCY PETITIONS**

Joshua N. Terry (the “Petitioning Creditor” or “Mr. Terry”) filed involuntary bankruptcy petitions (the “Involuntary Petitions”) against each of the two above-referenced related



companies (the “Alleged Debtors”) on January 30, 2018.<sup>1</sup> The Involuntary Petitions were contested, and the court held a multi-day trial (the “Trial”) spanning March 21, 22, 23, 27, and March 29, 2018.<sup>2</sup> This constitutes the court’s findings of fact, conclusions of law and ruling, pursuant to Fed. Rs. Bankr. Proc. 7052 and 9014.<sup>3</sup> As explained below, the court has decided that Orders for Relief are legally required and appropriate as to each of the Alleged Debtors.

## **I. FINDINGS OF FACT**

### **A. Introduction.**

1. The Alleged Debtors—Acis Capital Management, L.P. (“Acis LP”), a Delaware limited partnership, and ACIS Capital Management GP, L.L.C. (“Acis GP/LLC”), a Delaware limited liability company—are two entities in the mega-organizational structure of a company that is known as Highland Capital Management, L.P. (“Highland”).

2. Highland is a Dallas, Texas-based company that is a Registered Investment Advisor. Highland was founded in 1993 (changing its original name from “Protective Asset Management” to Highland in 1997) by James D. Dondero (“Mr. Dondero”), originally with a

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<sup>1</sup> Exhs. 50 & 51.

<sup>2</sup> Shortly after the Involuntary Petitions were filed, the court held hearings on February 6-7, 2018, on the Petitioning Creditor’s Emergency Motion to Abrogate or Modify 11 U.S.C. § 303(f), Prohibit Transfer of Assets, and Import, Inter Alia, 11 U.S.C. § 363 [DE # 3] (the “303(f) Motion”) and the Alleged Debtors’ Emergency Motion to Seek Emergency Hearing on the Alleged Debtors’ Motion to Dismiss Involuntary Petitions and Request for Award of Fees, Costs, and Damages [DE # 9] (the “Emergency Motion to Set Hearing on Motion to Dismiss”). The court ultimately granted the 303(f) Motion and denied the Emergency Motion to Set Hearing on Motion to Dismiss. Both the Petitioning Creditor and the Alleged Debtors have proposed that the court should consider the evidence it heard at the hearings held on February 6-7, 2018, in determining whether it should enter orders for relief. The court has, accordingly, considered such evidence in this ruling.

<sup>3</sup> Bankruptcy subject matter jurisdiction exists in this contested matter, pursuant to 28 U.S.C. § 1334(b). This is a core proceeding over which the bankruptcy court may exercise subject matter jurisdiction, pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O) and the Standing Order of Reference of Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984. This bankruptcy court has Constitutional authority to issue a final order or judgment in this matter, as it arises under a bankruptcy statute—11 U.S.C. § 303. Venue is proper in this district, pursuant to 28 U.S.C. § 1409(a), as the Alleged Debtors have their business headquarters in this district.

75% ownership interest, and Mark K. Akada (“Mr. Akada”), originally with a 25% ownership interest.<sup>4</sup>

3. Both Mr. Dondero and Mr. Akada provided witness testimony at the Trial on the Involuntary Petitions, and their names are mentioned numerous times herein—since they were generally the subject of significant evidence and argument presented at the Trial. Mr. Dondero is the chief executive officer for Highland and Mr. Akada is the chief investment officer. Mr. Dondero is also the president of each of the two Alleged Debtors.

4. Highland, through its organizational structure of approximately 2,000 separate business entities, manages approximately \$14-\$15 billion of investor capital in vehicles ranging from: collateral loan obligation funds (“CLOs”); private equity funds; and mutual funds.

5. Highland’s CLO business was front-and-center at the Trial on the Involuntary Petitions. The Alleged Debtor, Acis LP, for approximately the past seven years, has been the vehicle through which Highland’s CLO business has been managed.

6. The Petitioning Creditor, Mr. Terry, became an employee of Highland in the year 2005, starting as a portfolio analyst, promoting to a loan trader, then ultimately becoming the portfolio manager for (and 25% limited partner in) Highland’s CLO business—specifically, Mr. Terry was the human being who was acting for the CLO manager, Acis LP.

7. Mr. Terry was highly successful in his role in the CLO business, managing billions of dollars of assets during his tenure, but Mr. Terry and Mr. Dondero had a bitter parting of ways on June 9, 2016. Specifically, Mr. Terry’s employment was terminated on that date (for

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<sup>4</sup> Mr. Dondero testified at the Trial that, three years ago, Messrs. Dondero and Akada sold their interests in Highland to a charitable remainder trust in exchange for a 15 year note receivable.

reasons that have been highly disputed) and his 25% limited partnership interest in Acis LP was deemed forfeited without any payment of consideration to him.

8. In September 2016, Highland sued Mr. Terry in the 162<sup>nd</sup> Judicial District Court of Dallas County, Texas (“State Court 1”) for breach of fiduciary duty/self-dealing, disparagement, breach of contract, and various other causes of action and theories. Mr. Terry asserted his own claims against Highland, and also claims against the two Alleged Debtors, Mr. Dondero, and others and demanded arbitration. On September 28, 2016, State Court 1 stayed the litigation and ordered the parties to arbitrate. The parties participated in ten days of arbitration in September 2017 before JAMS. On October 20, 2017, Mr. Terry obtained an Arbitration Award (herein so called),<sup>5</sup> jointly and severally against both of the Alleged Debtors in the amount of \$7,949,749.15, plus post-award interest at the legal rate, which was based on theories of breach of contract and breach of fiduciary duties.

9. There are still claims pending between and among the Petitioning Creditor, Highland, and others (not including the Alleged Debtors) in State Court 1.

10. A Final Judgment (herein so called) confirming the Arbitration Award was entered by the 44<sup>th</sup> Judicial District Court of Dallas County, Texas (“State Court 2”) on December 18, 2017, in the same amount as that contained in the Arbitration Award—\$7,949,749.15.<sup>6</sup>

11. Mr. Terry began pursuing post-judgment discovery soon after obtaining his Arbitration Award and even more so after entry of the Final Judgment. Mr. Terry undertook a UCC search on November 8, 2017, to investigate whether there were any liens on the Alleged

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<sup>5</sup> Exh. 1.

<sup>6</sup> Exh. 105.

Debtors' assets (none appeared).<sup>7</sup> Mr. Terry also pursued a garnishment of an Acis LP bank account (at a time when there was only around \$2,000 in the account). Mr. Terry's counsel deposed Highland's General Counsel Scott Ellington (who sat for the deposition as a representative of Acis, LP) on January 26, 2018, and asked numerous questions about: (a) how many creditors the Alleged Debtors had,<sup>8</sup> and (b) whether Acis LP was able to pay its debts as they became due,<sup>9</sup> but did not receive meaningful answers.

12. Mr. Terry requested a temporary restraining order ("TRO") from State Court 2, on January 24, 2018, after discovering certain transactions and transfers involving Acis LP's interests, that he believed were pursued without any legitimate business purpose and with the purpose of denuding Acis LP of its assets and to make it judgment proof. Most particularly, it appeared as though Highland was engaged in a scheme to transfer certain fee-generating CLO management contracts of Acis LP away from it and into a Cayman Island affiliate of Highland.<sup>10</sup> At a January 24, 2018 hearing on the request for a TRO, Acis LP agreed and State Court 2 ordered that, between that hearing and a later hearing on a request for a temporary injunction, no CLO management contracts would be transferred away from Acis LP and that no monies would be diverted from it.<sup>11</sup>

13. Then, on January 29, 2018, the Controller of and CPA for Highland (David Klos) submitted a Declaration to State Court 2 concerning the net worth of the Alleged Debtors, stating

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<sup>7</sup> Exh. 84.

<sup>8</sup> Exh. 25, pp. 7-9.

<sup>9</sup> *Id.* at pp. 102-04.

<sup>10</sup> Exh. 27.

<sup>11</sup> Exh. 28.

that Acis GP/LLC had a net worth of \$0 and that Acis LP might have a net worth, at best, of \$990,141.<sup>12</sup> Mr. Terry thought this was preposterous—given the management fees that Acis LP was entitled to and the receivables that should be owing to it. Mr. Terry believes that the collateral management agreements on which Acis LP receives management fees have a present value of \$30 million (about \$6 million for each of the five CLOs which Acis LP has been managing).

14. On January 29, 2018, the Alleged Debtors filed a motion for leave to post a supersedeas bond in the amount of \$495,070.50 with State Court 2 (purportedly half of the net worth of the two Alleged Debtors—as stated in the David Klos Declaration), so that they could suspend enforcement of the Final Judgment while they appealed it.<sup>13</sup> Although there is a very stringent standard for appealing an Arbitration Award, the Alleged Debtors apparently believe they have an argument that State Court 2 lacked the subject matter jurisdiction to confirm the Arbitration Award (a motion to vacate the Final Judgment based on this argument has previously been denied by State Court 2).<sup>14</sup>

15. Meanwhile, Mr. Terry was learning of more transactions and transfers involving Acis LP's assets and interests. On January 29, 2018, Mr. Terry filed supplemental pleadings with State Court 2, alleging that further shenanigans (*i.e.*, transfers and transactions that would amount to fraudulent transfers) were underway at Acis LP and seeking a receiver.<sup>15</sup> Also, at

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<sup>12</sup> Exh. 26.

<sup>13</sup> Exh. 73.

<sup>14</sup> See DE # 35, in Case No. 18-30264 and DE # 34 in Case No. 18-30265. Unless otherwise noted, references to “DE #” herein refer to the docket entry number at which a pleading appears in the docket maintained with the Bankruptcy Clerk in the Acis Capital Management L.P. bankruptcy case (Case No. 18-30264).

<sup>15</sup> Exhs. 28-31.

some point, in the weeks leading up to this, an Acis LP lawyer represented to Mr. Terry's counsel that the Alleged Debtors were "judgment proof."<sup>16</sup>

16. At approximately 11:57 p.m. on January 30, 2018 (on the evening before a scheduled temporary injunction hearing in State Court 2—at which time State Court 2 presumably might have considered the Alleged Debtors' request to post the \$495,070.50 supersedeas bond to stay enforcement of the Final Judgment), Mr. Terry filed the Involuntary Petitions, as a sole petitioning creditor, against both Acis LP and Acis GP/LLC.

17. For purposes of this Trial (and this Trial only), the Alleged Debtors do not dispute that Mr. Terry has standing to be a petitioning creditor pursuant to Bankruptcy Code section 303(b)—in other words, they do not dispute that Mr. Terry is a holder of a claim against the Alleged Debtors that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount and that aggregates at least \$15,775 in unsecured amount. However, the Alleged Debtors argue that: (a) the Alleged Debtors have **12 or more creditors** and, thus, three or more petitioning creditors were required to prosecute the Involuntary Petitions pursuant to Bankruptcy Code section 303(b)(1); (b) the Petitioning Creditor did not establish, pursuant to Bankruptcy Code section 303(h)(1), that the Alleged Debtors are not **generally paying their debts as such debts become due** unless such debts are the subject of a bona fide dispute as to liability or amount; (c) regardless of whether the Petitioning Creditor has met the statutory tests in sections 303(b)(1) and (h)(1), the Petitioning Creditor has acted in **bad faith**—which serves as an equitable basis for dismissal of the Involuntary Petitions; and (d) if the court disagrees with the Alleged Debtors and determines that the section 303(b) and (h) statutory tests are met, and also determines that the Petitioning Creditor has not acted in bad faith, the court should

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<sup>16</sup> Exh. 27 (exhibit 3 thereto).

nevertheless ***abstain*** in this matter, pursuant to Bankruptcy Code ***section 305***, since this is essentially a two-party dispute and the interests of creditors and the debtor would be better served by dismissal.

18. The Petitioning Creditor argues that he has met the statutory tests of sections 303(b) and (h) but, even if he has not, there is a “***special circumstances***” exception to the section 303 statutory requirements, whenever a petitioning creditor establishes fraud, trick, scheme, artifice or the like on the part of an alleged debtor—which “special circumstances,” Mr. Terry alleges, have been established here. Moreover, the Petitioning Creditor argues that the facts here ***do not warrant section 305 abstention*** because the interests of creditors and the Alleged Debtors would not be better served by dismissal.

19. As further explained below, the court finds and concludes that the Petitioning Creditor has met his burden of proving by a preponderance of the evidence that the statutory tests of sections 303(b) and (h) are met here. Thus, the court does not need to reach the question of whether there is a “***special circumstances***” exception to the section 303 statutory requirements, whenever a petitioning creditor establishes fraud, trick, scheme, artifice or the like on the part of an alleged debtor, and—if so—whether the exception is applicable here.<sup>17</sup>

20. Moreover, the Alleged Debtors have not shown by a preponderance of the evidence that the Petitioning Creditor acted in bad faith, such that the Involuntary Petitions should be dismissed.

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<sup>17</sup> See e.g., *In re Norriss Bros. Lumber Co.*, 133 B.R. 599 (Bankr. N.D. Tex. 1991); *In re Moss*, 249 B.R. 411 (Bankr. N.D. Tex. 2000); *In re Smith*, 415 B.R. 222 (Bankr. N.D. Tex. 2009).

21. Finally, the Alleged Debtors also have *not shown facts here that warrant section 305 abstention* because they have not shown that the interests of creditors and the Alleged Debtors would be better served by dismissal.

**B. The CLO Business: Understanding the Alleged Debtors' Business Operations, Structure, and What Creditors and Interest Holders They Actually Have.**

22. Highland set up its first CLO in the year 1996. Highland was one of the early participants in the CLO industry.

23. The Alleged Debtors were formed in 2011 to be the new “brand” or face of the Highland CLO business, after Highland’s name had suffered some negative publicity in the marketplace.

24. Acis LP has acted as the portfolio manager of Highland’s CLOs since 2011. Acis LP currently has a contractual right to CLO portfolio management fees on five CLOs<sup>18</sup> which were referred to at the Trial as CLO 2013-1; CLO 2014-3; CLO 2014-4; CLO 2014-5; and CLO 2016-6. CLOs typically have an 8-12 year life. Thus, there are still several years of life left on these CLOs (since the oldest one was established in the year 2013).

25. The key “players” in and features with regard to the Highland CLOs, during the time period relevant to the issues adjudicated at the Trial, have been:

- (a) The CLO manager. As mentioned earlier, the CLO manager is the Alleged Debtor, Acis LP. Acis LP, has collateral management agreements (hereinafter, the “CLO Collateral Management Agreements”) with the CLOs (which CLOs were set up as special purpose entities) and, pursuant thereto, receives

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<sup>18</sup> There is still another Highland CLO (CLO 2017-7), set up in April 2017, as to which Acis LP’s contractual right to manage was terminated shortly before the Petition Date, as will be further described herein.



management fees<sup>19</sup> from the CLOs in exchange for managing the pool of assets within the CLOs and communicating with investors in the CLOs.<sup>20</sup> As mentioned earlier, Mr. Terry was the human being that performed the management function at Acis LP until Highland fired him on June 9, 2016 and also terminated his limited partnership interest in Acis LP. Mr. Terry, and all employees who have ever provided services to the CLO manager, are Highland employees—which were provided to Acis LP through shared and sub-advisory services agreements—as further explained below. Thus, to be clear, Acis LP has always essentially subcontracted its CLO managerial function out to Highland.

- (b) The pool of assets. Within each CLO that the CLO manager manages is a basket of loans that the CLO manager purchases. The basket of loans typically consists of approximately 200 loans-payable (or portions of loans payable), on which large well-known companies typically are the makers/obligors (and which loans, collectively, provide a variable rate of interest).<sup>21</sup> The CLO manager can typically decide to buy and sell different loans to go into the pool of assets, with certain restrictions, during a four or five year reinvestment time period.

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<sup>19</sup> These fees typically include “senior fees” (*e.g.*, 15 basis points); additional “subordinate fees” (*e.g.*, 25 basis points) if the CLOs are passing certain tests; and perhaps even an “incentive fee” beyond a certain hurdle rate (*e.g.*, after the equity in the CLO received an internal rate of return of 10%, the CLO manager would get 15% of the excess). Exh. 82, p. 59, lines 14-25.

<sup>20</sup> *See*, as an example, Exh. 3 (the collateral management agreement between Acis LP and CLO 2014-3). Note that the document is entitled “Portfolio Management Agreement” but, to avoid confusion with other similarly titled documents and to highlight the true nature of the agreement, the court uses the defined term “CLO Collateral Management Agreement,” which terminology the lawyers also sometimes used at the Trial.

<sup>21</sup> Exh. 8.

- (c) The CLO investors (*i.e.*, CLO note holders). These may be any number of persons or entities, including pension funds, life insurance companies, or others who decide to invest in the CLOs and contribute capital to fund the purchase of a CLO's loan pool, and, in return, receive fixed rate notes payable—the ratings on which can range anywhere from Triple-A to Single-B, depending upon the risk option the investor chooses. There are typically five or six tranches of notes issued by the CLO (with the top AAA-rated tranche being the least risky and the bottom tranche being the most risky) and—to be clear—the CLO itself (again, in each case, the CLO is a special purpose vehicle) is the obligor. As the CLO manager receives income from the pool of loans in the CLO, he distributes that income to the CLO investors, in accordance with their note indentures,<sup>22</sup> starting with the top tranche of notes and then down to the other tranches. The top tranche of notes (AAA-rated) is considered the “controlling” class and a majority of holders in this class can terminate the CLO manager (*i.e.*, Acis LP) for cause on 45 days' notice, although all parties seem to agree this would be a rare event.
- (d) The CLO equity holder. The CLO equity holder actually is a holder of subordinated notes issued by the CLOs (*i.e.*, the bottom tranche of notes on which the CLO special purpose entity is obligated), and has voting rights and is itself a capital provider, but it takes the most risk and receives the very last cash

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<sup>22</sup> The indenture trustee on the CLO notes may actually operate as a payment agent in some cases, for purposes of making the quarterly note payments to holders.

flow from the CLOs. It, in certain ways, controls the CLO vehicle<sup>23</sup>—for example, by virtue of having the ability to make a redemption call after a certain “no-call” period—which would force a liquidation of the basket of loans in the CLO, with the proceeds paying down the tranches of notes, starting at the top with the Triple A’s). Note that, until recently, a separate entity known as Acis Loan Funding, Ltd. (“ALF”), which was incorporated under the laws of the island nation of Guernsey,<sup>24</sup> was the CLO equity holder. To be clear, *ALF was essentially the equity owner in the CLO special purpose entities—not the equity owner of Acis LP*. Acis LP was a party to a separate portfolio management agreement with ALF (hereinafter, the “ALF Portfolio Management Agreement”—not to be confused with the CLO Collateral Management Agreements that Acis LP separately has with the special purpose CLOs). No fees were paid from ALF to Acis LP pursuant to the ALF Portfolio Management Agreement (rather, fees are only paid to Acis LP on the CLO Collateral Management Agreements). The complicated structure of the CLO business—all parties seemed to agree—has been developed, among other reasons, to comply with “risk-retention requirements” imposed by the U.S. Congress’s massive Dodd-Frank financial reform legislation<sup>25</sup> enacted in year 2010, in response to the financial crisis and recession that first began in 2008.

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<sup>23</sup> The top tranche of AAA notes also has certain control—such as the ability to terminate the portfolio manager for cause, on notice.

<sup>24</sup> Guernsey is located in the English Channel. ALF was created in August 2015.

<sup>25</sup> Simply put, one of the results of the Dodd-Frank legislation (*i.e.*, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173, 124 Stat. 1376-2223, 111th Congress, effective July 21, 2010), which was implemented over a period of several years, was that, *subsequent to December 2016*, managers of securitizations needed to retain at least a 5% interest in that securitization. Thus, if a \$400 million CLO were to be

- (e) The Equity Owners of ALF. Until recently (*i.e.*, until October 24, 2017—four days after the Arbitration Award), Acis LP itself, as required for a CLO manager, had a 15% indirect ownership in ALF, in order to be regulatory compliant.<sup>26</sup> The parties sometimes refer to ALF (and the web of ownership between it and Acis LP) as the “risk retention structure.”<sup>27</sup> The evidence at the Trial revealed that ALF (which has recently been renamed), now, has three equity owners: (i) a 49% equity owner that is a charitable fund (*i.e.*, a donor advised fund or “DAF”) that was seeded with contributions from Highland, is managed/advised by Highland, and whose independent trustee is a long-time friend of Highland’s chief executive officer, Mr. Dondero; (ii) 2% is owned by Highland employees; and (iii) finally, ALF *may* be 49% owned by a third-party institutional investor based in Boston that Highland believed it was required to keep anonymous at the Trial. Not only is the court unaware of who this independent third-party is, but the evidence seems to suggest that it may have acquired its interest fairly recently or may have simply committed to invest recently.<sup>28</sup>

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issued, the CLO manager would need to retain at least 5% or \$20 million of the assets in the CLO (which 5% could be either all at the equity level or vertically, up and down the note tranches). There are multiple ways to accomplish this 5% retention (*i.e.*, with either the CLO manager directly investing in at least 5% of the CLO or doing it through a controlled subsidiary). This particular rule was announced in **December 2014** and the SEC thereafter issued a no action letter stating that *if a CLO was issued prior to December 2014*, then any refinancing of such CLO that happens within four years can be done without risk retention in place. Resets of any CLO (*i.e.*, changes in terms and maturity—as opposed to mere changes in interest rates), on the other hand, must have risk retention in place. **Four of Acis LP’s current CLOs were issued prior to December 2014**. Thus, these four CLOs are still technically able to do a refinancing without a risk retention structure in place. In any event, by early-to-middle 2017, Acis LP was risk retention compliant. Exh. 82, pp. 65-69 & 75. That was recently changed—on October 24, 2017—four days after the Arbitration Award—as later explained herein.

<sup>26</sup> See n.23, *supra*.

<sup>27</sup> See Demonstrative Aid No. 3.

<sup>28</sup> See Exh. 173, which seems to suggest that the only equity owners of ALF just prior to October 24, 2017 were Acis LP and the DAF, until Acis LP’s interest in ALF was sold back to ALF on October 24, 2017. See also Exh. 82, p. 162, lines 2-7.

- (f) The underwriter for the CLO notes. As with any publicly traded notes, there is an underwriter for the CLO notes which solicits investors for the CLO notes (examples given at the Trial: Mizuho Securities USA, LLC; Merrill Lynch; JP Morgan Chase).<sup>29</sup> The CLO notes are traded on the Over-the-Counter Market.
- (g) The independent indenture trustee for the CLO notes. As also with any issuance of publicly traded notes, there is an indenture trustee (example given at the Trial: U.S. Bank).<sup>30</sup>

26. Mr. Terry, the Petitioning Creditor, as earlier mentioned, began working for Highland in 2005 until his employment was terminated on June 9, 2016.

27. Acis LP and Acis GP/LLC have never had any employees. Rather, all employees that work for any of the Highland family of companies (including Mr. Terry) have, almost without exception, been employees of Highland itself. Highland has approximately 150 employees in the United States. Highland provides employees to entities in the organizational structure, such as Acis LP and Acis GP/LLC, through both the mechanism of: (a) a Shared Services Agreement (herein so called),<sup>31</sup> which provides “back office” personnel—such as human resources, accounting, legal and information technology to the Highland family of companies; and (b) a Sub-Advisory Agreement (herein so called),<sup>32</sup> which provides “front office” personnel to entities—such as the managers of investments like Mr. Terry. The evidence indicated that this is typical in the CLO industry to have such agreements. The court notes that

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<sup>29</sup> See Exh. 193.

<sup>30</sup> See Exh. 7.

<sup>31</sup> Exhs. 17, 99, 179 & 5.

<sup>32</sup> Exhs. 18, 178 & 4.

all iterations of the Shared Services Agreements and Sub-Advisory Agreements between Acis LP and Highland were signed by Mr. Dondero both as President of Acis LP and as President of the General Partner of Highland.

28. Because Acis LP essentially subcontracts out all of its functions to Highland pursuant to the Shared Services Agreement and the Sub-Advisory Agreement, Acis LP has very few vendors or creditors. Rather Highland incurs expenses and essentially bills them to Acis LP through these two agreements.<sup>33</sup> In other words, Highland is one of Acis LP's largest and most frequent creditor.

29. The evidence reflected that at all times Mr. Dondero has been the President of both of the Alleged Debtors, and there have been, at all times, very few, if any, other officers. It appears that the only other officer of Acis GP/LLC that ever existed was Frank Waterhouse, Treasurer.<sup>34</sup> It also appears that the only other officer of Acis LP that ever existed was Frank Waterhouse, Treasurer, Mr. Terry as Portfolio Manager, and someone named Patrick Boyce as Secretary at one time.<sup>35</sup>

30. Mr. Dondero testified that he has decision making authority for the Alleged Debtors but usually delegates that authority to Highland's in-house lawyers, Scott Ellington (General Counsel, Chief Legal Officer, and Partner of Highland) and Isaac Leventon (Assistant General Counsel of Highland) and is rarely involved in "nitty gritty negotiations." Sometimes instructions will come to him from the compliance group headed up by Chief Compliance Officer Thomas Surgent. Additionally, he testified that he signs hundreds of documents per

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<sup>33</sup> Exh. 83, pp. 228 (line 8)-230 (line 14).

<sup>34</sup> See, e.g., Exh. 10 & Exh. 173, p.3

<sup>35</sup> Exhs. 14 & 15.

week, and much of what he signs is on advice of counsel and he sometimes even delegates to his assistant the authority to sign his name. As set forth above, Mr. Ellington (who *did not* testify at the Trial)<sup>36</sup> and Mr. Leventon (who *did* testify at the Trial) are not officers, directors, or employees of the Alleged Debtors. Mr. Leventon is designated to be the representative for the Alleged Debtors (and testified as a Rule 30(b)(6) witness during pre-Trial discovery)—he explained that this representative-authority derives from the Shared Services Agreement. Mr. Leventon testified that he takes his instructions generally through his direct supervisor, Mr. Ellington, although Highland partners can ask him to perform legal services for any of Highland’s 2,000 entities.

**C. Transfers and Transactions Involving the Alleged Debtors Since the Litigation with Mr. Terry Commenced—and Especially After the Arbitration Award.**

31. Below is a listing of some (but not necessarily all) of the transfers and transactions that the Alleged Debtors, Highland, and related parties undertook *after* the litigation with Mr. Terry commenced.

- (a) Acis LP’s Sale to Highland of a “Participation Interest” in its CLO Cash Flow Stream. On October 7, 2016 (approximately one month after the litigation arose among Mr. Terry, Highland, and the Alleged Debtors), Acis LP sold to Highland a participation interest in its expected future cash flow from the CLO Collateral Management Agreements—specifically, it sold a portion of the cash flow it expected to earn from November 2016 to August 2019 (not the full life of the CLOs), for \$666,655 cash, plus a \$12,666,446 note payable from Highland to

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<sup>36</sup> Mr. Ellington did testify at a hearing in the bankruptcy court on February 6, 2018—which the parties asked this court to take judicial notice of—and also provided deposition testimony that was submitted into evidence. See Exh. 25.

Acis LP (hereinafter, the “Acis LP Note Receivable from Highland”). Mr.

Dondero signed the purchase and sale agreement for both purchaser and seller.<sup>37</sup>

Mr. Dondero signed the Acis LP Note Receivable from Highland, which accrued interest at 3% per annum. It appears that the \$666,665 cash down payment was actually paid, and a payment required on the Acis LP Note Receivable from Highland of \$3,370,694 on May 31, 2017, was actually made. The Acis LP Note Receivable from Highland was payable in three installments, with a \$5,286,243 payment required on May 31, 2018, and a \$4,677,690 payment required on May 31, 2019. When viewed in complete isolation, this transaction does not necessarily appear problematic. Although there was evidence that Acis LP had been managing the five CLOs for about \$10 million per year of fees, some of the recitals in the purchase and sale agreement suggest that there may have been a sound business reason for the transaction and the arbitration panel,<sup>38</sup> viewing this transaction in isolation, did not think it was necessarily problematic or actionable. In any event, Highland is adamant it was a net neutral transaction.

- (b) Transfer of Acis LP’s interest in ALF. Recall that ALF was the entity that held equity (*i.e.*, the subordinated notes) in the CLO special purpose vehicles, and held voting rights and was a capital provider to the overall risk retention structure supporting the CLOs. And Acis LP, in turn, held a 15% indirect interest in ALF. On October 24, 2017 (*four days after the Arbitration Award*), Acis, LP entered into an agreement with ALF whereby ALF acquired back the shares that Acis LP

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<sup>37</sup> Exhs. 14 & 15.

<sup>38</sup> Exh. 1, p. 18.



indirectly held in ALF (966,679 shares) for the sum of \$991,180.13.<sup>39</sup> No credible business justification was offered for this transaction, other than mostly uncorroborated (and self-serving) statements from Highland witnesses that Acis LP was “toxic” in the market place (due to the litigation with Mr. Terry) and this was a step in the process of extricating Acis LP from the CLO business.<sup>40</sup> The court finds the testimony about Acis LP’s toxicity in the marketplace to not be credible or at all convincing. For one thing, a new CLO (Acis CLO 2017-7, Ltd.) was closed on April 10, 2017 with Acis LP as the portfolio manager. Moreover, Acis LP subcontracts all of its CLO management function to Highland—and there was no evidence to suggest that anyone in the marketplace at this juncture differentiates between Acis LP (whose president is Mr. Dondero) and Highland (whose president is Mr. Dondero). ***In any event, the October 24, 2017 transaction had the highly consequential effect of making Acis LP “noncompliant” or unable to continue serving as a CLO manager for regulatory purposes for any new CLOs or reset CLOs (or for a refinancing of any of the Highland CLOs that had been created after December 2014)***<sup>41</sup> ***because aspects of the federal Dodd Frank legislation require CLO managers to have “skin in the game” with regard to the CLOs they manage (i.e., they must retain at least 5% of CLOs they manage).*** Mr. Akada, who testified that he had been involved with the CLO business from the beginning and that the CLO team

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<sup>39</sup> Exh. 173.

<sup>40</sup> There were also a few hearsay-laden emails offered, that the court did not find probative. Exhs, 19-22.

<sup>41</sup> See n.23 *supra*.

reported to him (including Mr. Terry before his termination), testified that he had no knowledge of this particular transaction. The document effectuating this transaction was signed by Frank Waterhouse, Treasurer for and on behalf of Acis LP, acting by its general partner, Acis GP/LLC.<sup>42</sup>

(c) ALF Next Decides to Jettison Acis, LP as its Portfolio Manager and Replace it with a new Highland Cayman Island Entity. On October 27, 2017 (seven days after the Arbitration Award), ALF—having purchased back the ownership interest that Acis LP had in it, just three days earlier—decided that it would no longer use Acis LP as its portfolio manager and entered into a new portfolio management agreement to supersede and replace the ALF Portfolio Management Agreement. Specifically, on October 27, 2017, ALF entered into a new Portfolio Management Agreement with a Cayman Island entity called Highland HCF Advisor, Ltd., replacing Acis LP in its role with ALF.<sup>43</sup> This agreement appears to have been further solidified in a second portfolio management agreement dated November 15, 2017.<sup>44</sup>

(d) The Acis LP Note Receivable from Highland is Transferred from Acis LP to Yet Another Highland Cayman Island Entity. On November 3, 2017 (10 days after the Arbitration Award), Acis LP assigned and transferred its interests in the Acis LP Note Receivable from Highland—which at that point had a balance owing of over \$9.5 million—to a Highland Cayman Island entity known as Highland CLO

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<sup>42</sup> Exh. 173, p. 3.

<sup>43</sup> Exh. 43.

<sup>44</sup> Exh. 168.

Management Ltd. which apparently was created sometime recently to be the new collateral manager of the CLOs (in other words, the new Acis LP).<sup>45</sup> The Assignment and Transfer Agreement memorializing this transaction is signed by Mr. Dondero for Acis LP and Mr. Dondero for Highland and some undecipherable name for Highland CLO Management Ltd.<sup>46</sup> The document recites that (i) Highland is no longer willing to continue providing support services to Acis LP, (ii) Acis LP, therefore, can no longer fulfill its duties as a collateral manager, and (iii) Highland CLO Management Ltd. agrees to step into the collateral manager role if Acis LP will assign to it the Acis LP Note Receivable from Highland. One more thing: since Acis LP was expected to potentially incur future legal and accounting/administrative fees, and might not have the ability to pay them when due, **Highland CLO Management Ltd.** agreed to reimburse Acis LP (or pays its vendors directly) up to \$2 million of future legal expenses and up to \$1 million of future accounting/administrative expenses.<sup>47</sup>

- (e) Various Additional Transactions that further Transitioned CLO Management and Fees Away from Acis LP to Highland Cayman Island Entity. On December 19, 2017—just one day after the Arbitration Award was confirmed with the entry of the Final Judgment—the vehicle that can most easily be described as the Acis LP “risk retention structure” (necessitated by federal Dodd Frank law) was transferred away from Acis LP and into the ownership of Highland CLO

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<sup>45</sup> Exh. 16.

<sup>46</sup> *Id.* at p.6.

<sup>47</sup> *Id.* at pp. 1 & 2.

Holdings, Ltd. (yet another Cayman Island entity, incorporated on October 27, 2017<sup>48</sup>).

- (f) In addition to transferring Acis LP's interest in the Acis LP risk retention structure on December 19, 2017, Acis LP also transferred its contractual right to receive management fees for Acis CLO 2017-7, Ltd. (which had just closed April 10, 2017), which Mr. Terry credibly testified had a combined value of \$5 million, to Highland CLO Holdings, Ltd., another Cayman entity, purportedly in exchange for forgiveness of a \$2.8 million receivable that was owed to Highland under the most recent iteration of the Shared Services Agreement and Sub-Advisory Agreement for CLO-7.<sup>49</sup> In conjunction with this transfer, Highland CLO Holdings, Ltd. then entered into new Shared Services and Sub-Advisory Agreements with Highland.<sup>50</sup>
- (g) Change of Equity Owners of the Alleged Debtors. When Acis LP was first formed, it was owned by one general partner (Acis GP/LLC, with a .1% interest) and it had three limited partners: (a) Dugaboy Investment Trust (a Dondero family trust of which either Mr. Dondero or his sister, Nancy Dondero, have been the Trustee at all relevant times) with a 59.9% interest; (b) Mr. Terry with a 25% interest; and (c) Mr. Akada with a 15% interest. When Acis GP/LLC was formed

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<sup>48</sup> Exh. 157.

<sup>49</sup> See Ex. 45 (the Transfer Document); see also Exh. 4 (the March 17, 2017 Third Amended and Restated Sub-Advisory Agreement between Acis LP and Highland); Exh. 5 (the March 17, 2017 4th Amended & Restated Shared Services Agreement between Acis LP and Highland); Exh. 165 (March 17, 2017 Staff and Services Agreement between Acis CLO Management, LLC and Acis LP); Exh. 166 (March 17, 2017 Master Sub-Advisory Agreement between Acis CLO Management, LLC and Acis LP).

<sup>50</sup> See Exhs. 161 & 162.

(i.e., the .1% owner of Acis LP), its sole member was the Dugaboy Investment Trust. After Mr. Terry was terminated by Highland, his 25% limited partnership interest in Acis LP was forfeited and divided among the two remaining limited partners: Mr. Akada (increasing his interest by 10% up to 25%), and Dugaboy Investment Trust (increasing its interest by 15% up to 74.9%). But, more importantly, on the day after entry of Mr. Terry's Final Judgment (i.e., on December 18, 2017), both Mr. Akada and Dugaboy Investment Trust conveyed their entire limited partnership interests in Acis LP—25% and 74.9%, respectively—to a Cayman Island entity called Neutra, Ltd., a Cayman Islands exempted company. Dugaboy Investment Trust also conveyed its 100% membership interest in Acis GP/LLC to Neutra, Ltd. Mr. Akada testified that he did this on advice of counsel. He also did not dispute that he had made millions of dollars of equity dividends from his equity investment in Acis LP in recent years<sup>51</sup>—which he conveyed away for no consideration on December 18, 2017.

- (h) The Intended Reset of Acis CLO 2014-3. With all of the above maneuverings having been accomplished, Highland was posed to do a reset on Acis CLO 2014-3 in February 2018 (until Mr. Terry filed the Involuntary Petitions). The investment bank Mizuho Securities USA, LLC was engaged November 15, 2017<sup>52</sup> and a final offering circular was issued in January 2018<sup>53</sup>—contemplating a reset of Acis CLO 20-14-3 with the recently created Highland CLO Management Ltd.

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<sup>51</sup> Exh. 23, p.3.

<sup>52</sup> Exh. 104.

<sup>53</sup> Exh. 31.

Identified as the new portfolio manager, rather than Acis LP. The act of implementing a reset on the CLO was not in itself suspect. However, the reset would, of course, have the effect of depriving Acis LP from a valuable asset—an agreement that could realistically be expected to provide millions of dollars of future collateral management fees—coincidentally (or not) just after Mr. Terry obtained his large judgment.

**D. Findings Regarding Credibility of Witnesses.**

32. The court found the testimony of Mr. Terry to be very credible. He was very familiar with the financial condition of the Alleged Debtors, since he presided over the business of the Alleged Debtors from their inception until June 9, 2016, and has also closely followed publicly available information regarding the companies since his termination. Mr. Terry credibly testified that the Alleged Debtors have never had a significant number of creditors, since most of the Alleged Debtors' vendors are engaged by and send their invoices to Highland, and Highland simply obtains reimbursement from the Alleged Debtors (and other entities in the Highland family), as its in-house lawyers determine is appropriate, through the Shared Services Agreement and Sub-Advisory Agreement. Thus, Highland should at all times be the Alleged Debtors' main creditor. The court finds that Mr. Terry had a good faith belief that the Alleged Debtors had only a handful of creditors (maybe four or so) besides him and Highland. The court also finds that Mr. Terry—at the time he filed the Involuntary Petitions—had a good faith belief that the Alleged Debtors and those controlling them were engaged in an orchestrated, sophisticated effort to denude the Alleged Debtors of their assets and value (*i.e.*, transferring assets and rights for

less than reasonably equivalent value), which started with intensity after issuance of the Arbitration Award (if not sooner).<sup>54</sup>

33. The court found the testimony of almost all of the witnesses for the Alleged Debtors to be of questionable reliability and, oftentimes, there seemed to be an effort to convey plausible deniability. For example, sometimes business decisions concerning the Alleged Debtors were said to have been made by a “collective,” and other times the in-house Highland lawyers (who, of course, are not themselves officers or employees of Acis LP and Acis GP/LLC) stressed that Mr. Dondero (the president and manager of the two entities) had ultimate decision making authority for them. Meanwhile, Mr. Dondero testified that, while he has decision making authority at Acis LP, he usually delegates to Highland’s in-house lawyers Scott Ellington and Isaac Leventon. He testified that he signs hundreds of documents per week and often must rely on information of others when signing. Additionally, Mr. Dondero (again, the President of each of the Alleged Debtors) testified that he had never even read the Arbitration Award. While Mr. Dondero is the chief executive of a multi-billion dollar international investment company, and naturally has widespread responsibilities and must delegate to and rely upon others including lawyers, this court simply does not believe that he never read the Arbitration Award. The court perceived the animosity between Mr. Dondero and Mr. Terry to be rather enormous and Mr. Dondero even testified (as did others) that the litigation with Mr. Terry was hurting Acis LP and Highland in the CLO marketplace (*i.e.*, no investors or underwriters wanting to be associated

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<sup>54</sup> The court also found that the deposition testimony of Brian Shaw and Rahkee Patel (counsel for Mr. Terry) was also credible and did not demonstrate any bad faith on their parts in filing the Involuntary Petitions on behalf of Mr. Terry.

with the Acis brand).<sup>55</sup> If that were the case, it strains credulity to suggest Mr. Dondero never even read the Arbitration Award.

34. As mentioned earlier, in December 2017, Acis GP/LLC became 100% owned by a Cayman Island entity known as Neutra, Ltd. (whose beneficial owner is a Dondero family trust) and Acis LP became 99.9% owned by Neutra, Ltd. The directors of Acis GP/LLC and Acis LP are provided to it now by an entity known as “Maples Fiduciary Services”—another Cayman Island entity, but the Highland Assistant General Counsel could not remember the names of those directors provided to Acis GP/LLC and Acis LP, except for perhaps one. Mr. Dondero, when questioned about some of the recent transactions pertaining to Acis LP, testified that there were tax reasons—tax lawyers recommended the recent transactions and transfers. No tax lawyers testified. Mr. Dondero also testified that certain transactions were at the directive of the Thomas Surgent group (the Highland chief compliance officer). Neither Mr. Surgent nor anyone else from the compliance group testified.

35. Meanwhile, Mr. Akada, who, while testifying, seemed like a generally lovely person and seemed as knowledgeable as a human being could possibly be on the topic of CLOs generally, had no idea if he was an officer or director of the Alleged Debtors, nor did he know whom its officers were. He could not testify as to the meaning of certain transactions in which Acis LP had engaged in during recent weeks and said that he signed certain documents on advice of counsel. He also could not even testify as to whether Highland was opposing the Involuntary Petitions.

36. Again, there was a lot of plausible deniability at Trial as to the “whos” and “whys” for the recent maneuverings involving the Alleged Debtors assets and rights in the weeks

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<sup>55</sup> No such investors or underwriters provided testimony.



since the Arbitration Award. The one thing that the court was wholly convinced of was that conflicts of interest among Highland and the Alleged Debtors abound, and no one is looking out for the interests of the Alleged Debtors as a fiduciary should.

**E. Evidence Regarding the Number of Creditors of the Alleged Debtors.<sup>56</sup>**

37. The Alleged Debtors do not dispute Mr. Terry's claim for the purposes of counting creditors under section 303(b) of the Bankruptcy Code. However, Mr. Terry asserts that the Alleged Debtors have fewer than 12 creditors, and the Alleged Debtors dispute this fact. Specifically, the Alleged Debtors initially filed on January 31, 2018, a Notice of List of Creditors Pursuant to Fed. R. Bankr. P. 1003(b) signed by Mr. Dondero listing 18 creditors (the "Original Notice of Creditors").<sup>57</sup> The Alleged Debtors subsequently filed on February 5, 2018, a First Amended Notice of List of Creditors Pursuant to Fed. R. Bankr. P. 1003(b) signed by Mr. Leventon listing 19 creditors (the "First Amended Notice of Creditors").<sup>58</sup> Finally, the Alleged Debtors filed on March 6, 2018, a Second Amended Notice of List of Creditors Pursuant to Fed. R. Bank. P. 1003(b) signed by Mr. Leventon listing 20 creditors (the "Second Amended List of Creditors").<sup>59</sup> The following chart summarizes the name, amount, and nature of the 20 creditors listed by the Alleged Debtors in their Second Amended List of Creditors.

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<sup>56</sup> The court notes that neither Mr. Terry nor the Alleged Debtors attempted to differentiate between the creditors of Acis GP/LLC versus the creditors of Acis LP, but rather presented evidence regarding the collective number of creditors for both of the Alleged Debtors. This seems legally appropriate, since Acis LP is the entity that incurred most of the debt, and ACIS GP/LLC would be liable on such debt as the general partner of Acis LP.

<sup>57</sup> See DE # 7 in Case No. 18-30264 & DE # 7 in Case No. 18-30265.

<sup>58</sup> See DE # 17 in Case No. 18-30264 & DE # 16 in Case No. 18-30265.

<sup>59</sup> See DE # 39 in Case No. 18-30264 & DE # 38 in Case No. 18-30265.

Creditor No.	Creditor Name	Nature of Claim	Total Indebtedness <sup>60</sup>
1	Andrews Kurth	Legal Fees	\$211,088.13
2	Case Anywhere, LLC	Law Firm Vendor	\$417.20
3	CSI Global Deposition Services	Law Firm Vendor	\$38,452.56
4	David Langford	Court Reporter/Law Firm Vendor	\$550
5	Drexel Limited	Fee Rebate	\$6,359.96
6	Elite Document Technology	Data Hosting/Law Firm Vendor	\$199.72
7	Highfield Equities, Inc.	Fee Rebate	\$2,510.04
8	Highland Capital Management, L.P.	Advisory and Participation Fees	\$2,770,731.00
9	JAMS, Inc.	Law Firm Vendor	\$1,352.27
10	Jones Day	Legal Fees	\$368.75
11	Joshua Terry	Judgment Creditor	\$8,060,827.84
12	KPMG LLP	Auditor Fees	\$34,000
13	Lackey Hershman LLP	Legal Fees	\$236,977.54
14	McKool Smith, P.C.	Legal Fees	\$70,082.18
15	Reid Collins & Tsai LLP	Legal Fees	\$17,383.75
16	Stanton Advisors LLC	Testifying Expert Fees/Law Firm Vendor	\$10,000
17	Stanton Law Firm	Legal Fees	\$88,133.99
18	The TASA Group. Inc.	Testifying Expert Fees/Law Firm Vendor	\$14,530.54
19	CT Corporation	Report Filing Representation	\$517.12
20	David Simek	Expense Reimbursement	\$1,233.19

38. First, the court believes it necessary to remove certain insider creditor claims, which are required not to be counted pursuant to section 303(b)(2) of the Bankruptcy Code.<sup>61</sup> This would clearly include Highland (the Alleged Debtors do not dispute this).

<sup>60</sup> The dollar amounts listed here are based upon the amounts listed in the Second Amended List of Creditors.

<sup>61</sup> *In re Moss*, 249 B.R. 411, 419 n. 6 (Bankr. N.D. Tex. 2000).

39. Additionally, there were certain creditors that filed sworn statements saying they were not creditors of the Alleged Debtors or were subsequently removed from the creditor list by agreement of the Alleged Debtors. These creditors would include Case Anywhere, CSI Global Deposition Services,<sup>62</sup> Elite Document Technology, JAMS, Inc.,<sup>63</sup> Stanton Advisors LLC,<sup>64</sup> and the TASA Group, Inc..<sup>65</sup> Thus, the updated chart now shows 13 creditors of the Alleged Debtors.

Creditor No.	Creditor Name	Nature of Claim	Total Indebtedness
1	Andrews Kurth	Legal Fees	\$211,088.13
2	Case Anywhere, LLC	Law Firm Vendor	\$417.20
3	CSI Global Deposition Services	Law Firm Vendor	\$38,452.56
4	David Langford	Court Reporter/Law Firm Vendor	\$550
5	Drexel Limited	Fee Rebate	\$6,359.96
6	Elite Document Technology	Data Hosting/Law Firm Vendor	\$199.72
7	Highfield Equities, Inc.	Fee Rebate	\$2,510.04
8	Highland Capital Management, L.P.	Advisory and Participation Fees	\$2,770,731.00
9	JAMS, Inc.	Law Firm Vendor	\$1,352.27
10	Jones Day	Legal Fees	\$368.75
11	Joshua Terry	Judgment Creditor	\$8,060,827.84
12	KPMG LLP	Auditor Fees	\$34,000
13	Lackey Hershman LLP	Legal Fees	\$236,977.54
14	McKool Smith, P.C.	Legal Fees	\$70,082.18
15	Reid Collins & Tsai LLP	Legal Fees	\$17,383.75

<sup>62</sup> CSI Global Deposition Services was removed as a creditor by the agreement of the Alleged Debtors.

<sup>63</sup> JAMS, Inc. was removed as a creditor by agreement of the Alleged Debtors.

<sup>64</sup> Stanton Advisors LLC was removed as a creditor by agreement of the Alleged Debtors.

<sup>65</sup> See Exh. 40B, Exh. 186, Exh. 92, and Exh. 94.

16	Stanton Advisors LLC	Testifying Expert Fees/Law Firm Vendor	\$10,000
17	Stanton Law Firm	Legal Fees	\$88,133.99
18	The TASA Group, Inc.	Testifying Expert Fees/Law Firm Vendor	\$14,530.54
19	CT Corporation	Report Filing Representation	\$517.12
20	David Simek	Expense Reimbursement	\$1,233.19

40. Next, the court finds that there are certain creditors included in the “Law Firm Vendor” category (*e.g.*, experts, data hosting, document managers, court reporters) that are really creditors of the individual law firms and/or Highland, and that these law firm vendor creditors should not be considered creditors of the Alleged Debtors. For these, there was no evidence of a direct contractual obligation on the part of either the Alleged Debtors or Highland—although the court certainly understands that, when the law firms would retain vendors, they would bill these to either the Alleged Debtors or Highland as an expense to be reimbursed. Most of these were already eliminated with agreement of the Alleged Debtors but, from the remaining list of creditors, this would include David Langford (a Dallas County court reporter).<sup>66</sup> To be clear, while the individual law firm creditors may ultimately have a right to reimbursement for these vendor expenses from Highland (who may then potentially have a right to reimbursement from the Alleged Debtors via the Shared Services and Sub-Advisory Agreements), the court does not find this vendor to have a claim *directly* against the Alleged Debtors for purposes of section 303(b) of the Bankruptcy Code.

<sup>66</sup> See Exh. 40D, Exh. 187, Exh. 40O.

41. Next, as to the Stanton Law Firm, the court finds that this creditor should also be removed from the pool of creditors that “count,” for section 303(b) purposes, since this claim appears to be the subject of a “bona fide dispute as to liability or amount,”<sup>67</sup> based on the evidence presented at the Trial. First, there was no engagement letter between either of the Alleged Debtors and the Stanton Law Firm produced.<sup>68</sup> Second, the heavily redacted invoice of the Stanton Law Firm dated October 18, 2016 shows only that it was relating to the “Joshua Terry Matter” and that it was billed to Highland.<sup>69</sup> Third, the Responses and Objections to Mr. Terry’s Notice of Intention to Take Depositions by Written Questions sent to the Stanton Law Firm<sup>70</sup> provides the following responses:

**Question No. 11:** What is the total amount of debt Acis Capital Management L.P. to the Firm. is liable to the Firm.

**Answer:** Acis Capital Management L.P.’s debt to the Firm is unknown at this time.

**Question No. 12:** What is the total amount of debt Acis Capital Management GP, LLC is liable for to the firm?

**Answer:** Acis Capital Management GP, LLC to the Firm is unknown at this time.

**Question No. 13:** Is any other party also liable for the debt of Acis Capital Management L.P. to the Firm? If so, please state the liable party and portion of Acis Capital Management L.P. debt the other party is liable for to the Firm.

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<sup>67</sup> See *Credit Union Liquidity Servs., L.L.C. v. Green Hills Dev. Co., L.L.C.* (In re *Green Hills Dev. Co., L.L.C.*), 741 F.3d 651, 655 (5th Cir. 2014) (a claimholder does not have standing to file a petition under section 303(b) if its claim is “the subject of a bona fide dispute as to liability or amount”); *In re Smith*, 415 B.R. 222, 237 (Bankr. N.D. Tex. 2009) (only “a holder of a claim ... that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount” is counted in determining the number of creditors necessary to file an involuntary petition).

<sup>68</sup> Rather, there is only an engagement letter between Lackey Hershman LLP (acting on behalf of its client, Highland) and Stanton Advisors LLC to act as an expert in the Terry litigation. See Exh. 144. As previously noted, the claim of Stanton Advisors LLC was removed from the creditor list by agreement of the Alleged Debtors.

<sup>69</sup> See Exh. 40R.

<sup>70</sup> The court notes that these responses were actually signed by James Michael Stanton, attorney for Stanton LLP. See Exh. 139.

**Answer:** Whether any other party is also liable to the firm for the debt of Acis Capital Management, L.P. is unknown at this time.

**Question No. 14:** Is any other party also liable for the debt of Acis Capital Management GP, LLC to Firm? If so, please state the liable party and portion of Acis Capital Management GP, LLC debt the other party is liable for to the Firm.

**Answer:** Whether any other party is also liable for the debt of Acis Capital Management GP, LLC is unknown at this time. . . .

**Question No. 21:** Does the Firm currently represent Acis Capital Management, L.P.? If so, please state the representation.

**Answer:** Based on Acis's assertion that this question calls for information protected by the attorney-client privilege, the Firm cannot answer this question at this time.

**Question No. 22:** Does the Firm currently represent Acis Capital Management GP, LLC? If so, please state the representation?

**Answer:** Based on Acis's assertion that this question calls for information protected by the attorney-client privilege, the Firm cannot answer this question at this time. . . .<sup>71</sup>

The court finds that this evidence demonstrates that the claim of the Stanton Law Firm is the subject of a bona fide dispute as to either liability or amount and should not be counted since there is no real way of even knowing who the Stanton Law Firm was engaged by and, thus, whether the Alleged Debtors are even responsible for these alleged legal fees. The court would also specifically refer to the testimony of Mr. Leventon, the in-house lawyer employed by Highland who was in charge of allocating all of the bills that came into Highland's legal invoicing system, where he described a process in which all legal bills relating to the "Terry Matter" would automatically be assigned to the Alleged Debtors, without any real regard to whether the particular law firm had even been engaged by the Alleged Debtors or if whether the

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<sup>71</sup> See Exhibit 139.

representation was actually relating to one of the other parties in the Terry litigation (*e.g.*, Highland, Mr. Dondero, etc.). Accordingly, the court finds that there is a bona fide dispute as to whether the Alleged Debtors are actually liable for the Stanton Law Firm legal fees and that they should not be counted as a creditor for purposes of section 303(b) of the Bankruptcy Code.<sup>72</sup>

42. Thus, it appears, at most, that there are 11 creditors<sup>73</sup> of the Alleged Debtors as set forth in the chart below:

Creditor No.	Creditor Name	Nature of Claim	Total Indebtedness
1	Andrews Kurth	Legal Fees	\$211,088.13
2	Case Anywhere, LLC	Law Firm Vendor	\$417.20
3	CSI Global Deposition Services	Law Firm Vendor	\$38,452.56
4	David Langford	Court Reporter/Law Firm Vendor	\$550
5	Drexel Limited	Fee Rebate	\$6,359.96
6	Elite Document Technology	Data Hosting/Law Firm Vendor	\$199.72
7	Highfield Equities, Inc.	Fee Rebate	\$2,510.04
8	Highland Capital Management, L.P.	Advisory and Participation Fees	\$2,770,731.00
9	JAMS, Inc.	Law Firm Vendor	\$1,352.27
10	Jones Day	Legal Fees	\$368.75

<sup>72</sup> See also *In re CorrLine Int'l, LLC*, 516 B.R. 106, 152 (Bankr. S.D. Tex. 2014) (bankruptcy court found that creditors contained in the alleged debtor's list of creditors with uncertain or unknown amounts could not be counted towards the numerosity requirement of section 303(b)).

<sup>73</sup> The court notes that, in all likelihood, the list of creditors that should be tallied for purposes of section 303(b) may actually be less than 11, because certain of the remaining creditors (*i.e.*, Drexel Limited, Highfield Equities, Inc., Lackey Herschman LLP, and David Simek) received payments during the 90 days preceding the Petition Date—and, thus, arguably should not be counted as creditors pursuant to section 303(b) of the Bankruptcy Code (which instructs that transferees of voidable transfers should not be counted). See, *e.g.*, Exh. 124 & Exh. 131. Additionally, certain of the remaining law firm creditors that are owed legal fees are also creditors of Highland and Highland-affiliates, not just the Alleged Debtors. To elaborate, many of these law firm creditors were employed to represent not only the Alleged Debtors, but also Highland and Highland-affiliates, so there may be an actual dispute as to the allocation of these legal fees among Highland and the Alleged Debtors (thus there could be bona fide disputes as to the amounts allocated by Highland's in-house lawyers to the Alleged Debtors). See, *e.g.*, Ex. 123 (McKool Smith, P.C. engagement letter referencing representation of numerous parties) & Exhibit 90 (Reid Collins & Tsai's Answers and Objections to Mr. Terry's Deposition by Written Questions, questions 13 & 14, stating that based upon allocation determinations to be made by Highland, other individuals may be liable for the full amount of the debt including Acis LP, Highland, Mr. Dondero, and Mr. Okada).



11	Joshua Terry	Judgment Creditor	\$8,060,827.84
12	KPMG LLP	Auditor Fees	\$34,000
13	Lackey Hershman LLP	Legal Fees <sup>74</sup>	\$236,977.54
14	McKool Smith, P.C.	Legal Fees	\$70,082.18
15	Reid Collins & Tsai LLP	Legal Fees	\$17,383.75
16	Stanton Advisors LLC	Testifying Expert Fees/Law Firm Vendor	\$10,000
17	Stanton Law Firm	Legal Fees	\$88,133.99
18	The TASA Group, Inc.	Testifying Expert Fees/Law Firm Vendor	\$14,530.54
19	CT Corporation	Report Filing Representation	\$517.12
20	David Simek	Expense Reimbursement	\$1,233.19

43. Finally, on the topic of creditor numerosity, the court further finds that the evidence strongly suggested hurried manufacturing of creditors on the part of the Alleged Debtors and Highland, in order to bolster an argument that having a sole petitioning creditor was legally inadequate in this case.<sup>75</sup> For example, the Klos Declaration and other information, that was provided to State Court 2 and in discovery, only days before the Involuntary Petitions were filed,

<sup>74</sup> Mr. Terry has also argued that certain of the law firm creditors (McKool Smith, P.C., Lackey Hershman, LLP, and Reid Collins & Tsai) are “insiders” that must be excluded from the creditor list pursuant to section 303(b) of the Bankruptcy Code. While there may be some support in case law for such an argument, Mr. Terry would ultimately need to show by a preponderance of the evidence that the law firms exercised such control or influence over the Alleged Debtors as to render their transactions not at arm’s length. *See In re CorrLine Intern., LLC*, 516 B.R. 106, 157-58 (Bankr. S.D. Tex. 2014) (citing to *Kepler v. Schmalbach (In re Lemanski)*, 56 B.R. 981, 983 (Bankr.W.D.Wis.1986)). *See also In re Holloway*, 955 F.2d 1008, 1011 (5th Cir. 1992) (in evaluating whether insider status existed for purposes of evaluating alleged fraudulent conveyance court considered (1) the closeness of the relationship between the transferee and the debtor; and (2) whether the transactions between the transferee and the debtor were conducted at arm’s length). Because there was no evidence suggesting abuse or control by these law firm creditors, nor was there any evidence that would suggest that their dealings with the Alleged Debtors were anything but arm’s length, the court finds that these law firm creditors should not be excluded from the creditor list as “insiders” pursuant to section 303(b) of the Bankruptcy Code.

<sup>75</sup> *See* the Original Notice of Creditors, the First Amended Notice of Creditors, and the Second Amended Notice of Creditors.



seemed to show only a small number of creditors of Acis LP—Mr. Terry credibly testified that he thought there were less than 12 creditors based on his review of such information, as well as his understanding of the Alleged Debtors’ business. Yet, only a few days later, the Alleged Debtors filed their Original Notice of Creditors, which showed 18 creditors, which was amended twice to add another creditor and then yet another. This simply does not jive in the court’s mind and supports this court’s belief that the Alleged Debtors were scurrying to determine which Highland creditors might cogently be painted as Acis LP creditors—so as to preclude Mr. Terry from being able to file the Involuntary Petitions as the single, petitioning creditor.

**F. Evidence Regarding Whether the Alleged Debtors are Generally Not Paying Debts as They Become Due (Unless Such Debts are the Subject of a Bona Fide Dispute as to Liability or Amount).**

44. The evidence submitted reflects that, for the 11 creditors identified above, 9 out of 11 have unpaid invoices that were more than 90 days old. The remaining 2 of the 11 were McKool Smith, P.C. (current counsel for the Alleged Debtors) and the Petitioning Creditor.<sup>76</sup> The court makes findings with regard to each of the 11 creditors below—focusing specifically on whether the Alleged Debtors have been paying these creditors as their debts have become due.

45. First, with regard to Andrews Kurth & Kenyon (“AKK”), the evidence reflected that out of the \$211,088.13 allegedly owed by Acis LP to AKK, the great majority of it—\$173,448.42—was invoiced on November 16, 2016<sup>77</sup> (more than 14 months before the Petition Date). Other, smaller amounts were invoiced on a monthly basis in each of the months August 2017, September 2017, October 2017, November 2017, and December 2017. Although requested in discovery, no engagement letter for AKK was produced and AKK represented in

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<sup>76</sup> Exhs. 40 & 54.

<sup>77</sup> Exh. 40.

written discovery that, to its knowledge, none existed.<sup>78</sup> The court notes anecdotally that AKK's invoices (although allegedly related to Acis LP legal matters) were addressed to Highland.<sup>79</sup> In any event, AKK represented that both the Alleged Debtors and Highland are jointly and severally liable for the fees owed to it.<sup>80</sup> AKK also represented that, to its knowledge, the amounts owing to it by Acis LP and Highland are not disputed.<sup>81</sup> AKK also represented that it has not provided legal work on a contingency basis for the Alleged Debtors or Highland.<sup>82</sup> The court makes a logical inference that AKK expected timely payment of its invoices—the largest of which was dated more than 14 months prior to the Petition Date—and, thus, it has generally not been paid timely.

46. Next, with regard to Drexel Limited, the Petitioning Creditor concedes that its \$6,359.96 indebtedness (which is a fee rebate owing to it) is not past-due.

47. Next, with regard to Highfield Equities, Inc., the Petitioning Creditor concedes that its \$2,510.04 indebtedness (which is also a fee rebate owing to it) is not past-due.

48. Next, with regard to the Jones Day law firm, the \$368.75 indebtedness owed to it is well more than 90 days old. Specifically, there is a six-and-a-half-month old invoice dated July 19, 2017 invoice in the amount of \$118.75, and two five-month old invoices dated August 30, 2017 (both in the amount of \$150).<sup>83</sup> The court makes a logical inference that Jones Day

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<sup>78</sup> Exh. 98, Requests 1-2.

<sup>79</sup> Exh. 98, pp. AKK000061-AKK000060.

<sup>80</sup> Exh. 98, Question 13.

<sup>81</sup> Exh. 98, Questions 52-55.

<sup>82</sup> Exh. 98, Questions 73-75.

<sup>83</sup> Exh. 40K.

expected timely payment of its invoices prior to the Petition Date and, thus, it has generally not been paid timely.

49. Next with regard to the Petitioning Creditor, Mr. Terry, the court notes that his liquidated claim in the amount of \$8,060,827.84 first arose with the final Arbitration Award on October 20, 2017 (although such award was not confirmed by State Court 2 until December 18, 2017). The judgment was unstayed as of the January 30, 2018 Petition Date, although the Alleged Debtors state that they still desire to appeal it—as difficult as that is in the situation of an arbitration award. The court makes a logical inference that the Alleged Debtors had, on the Petition Date, no intention of paying this claim any time soon based on their conduct after the Arbitration Award—although the Arbitration Award had only been in existence for three-and-a-half months as of the Petition Date. The cash in the Alleged Debtors’ bank accounts is wholly insufficient to cover the Arbitration Award and, meanwhile, corporate transactions have been ongoing to ensure that no cash streams will be coming into Acis LP in the future in the same way that they have in the past. Thus, this court finds that this large claim, as of the Petition Date, was not being paid timely.

50. Next with regard to KPMG LLP, the \$34,000 indebtedness owed to it was for the service of auditing Acis LP’s financial statements, pursuant to an engagement letter with it dated March 1, 2017.<sup>84</sup> KPMG’s engagement letter reflected a \$40,000 flat fee was agreed to by Acis LP for the service, of which 40% was due October 2017 (*i.e.*, \$16,000), with another 45% was due in January 2018 (\$18,000), and the remaining 15% would be due at the time that a final bill was sent. Acis LP has only paid \$6,000 of the agreed upon amount—meaning \$28,000 was overdue as of the January 30, 2018 Petition Date (with \$10,000 of that being four months past

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<sup>84</sup> Exh. 40M.

due). The court makes a logical inference that KPMG LLP expected payment of its audit fees in accordance with its engagement letter and, thus, it has generally not been paid timely.

51. Next with regard to Lackey Hershman LLP, the \$236,977.54 indebtedness owed to it was for legal services provided to the Alleged Debtors and Highland in connection with the arbitration and litigation with Mr. Terry. No engagement letter was provided, but the invoices for their services are all directed to Highland.<sup>85</sup> The evidence reflected that three invoices had not been paid as of the Petition Date: an October 31, 2017 invoice in the amount of \$56,909.53; a November 30, 2017 invoice setting forth new fees in the amount of \$84,789.83; and a December 31, 2017 invoice setting forth new fees in the amount of \$95,278.18.<sup>86</sup> The court makes a logical inference that Lackey Hershman LLP expected prompt payment on its invoices (if nothing else, the statement on its invoice indicating “Total now due”)<sup>87</sup> and, thus, it has generally not been paid timely.

52. Next with regard to Reid Collins & Tsai LLP, the \$17,383.75 indebtedness owed to it was billed in an invoice dated August 31, 2017, indicating an August 31, 2017 “Due Date” (five months before the Petition Date).<sup>88</sup> Although requested in discovery, no engagement letter for this firm was produced and Reid Collins & Tsai LLP in fact represented in written discovery that none existed.<sup>89</sup> Moreover, written discovery propounded on the law firm indicated that, while Acis LP was liable on this debt, other parties including Acis GP/LLC, Highland, Mr.

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<sup>85</sup> Demonstrative Aid No. 1 (Lackey Hershman tab).

<sup>86</sup> Exh. 40, p. 3.

<sup>87</sup> Demonstrative Aid No. 1 (Lackey Hershman tab).

<sup>88</sup> Exh. 40P; Exh. 130, pp. 7-8.

<sup>89</sup> Exh. 90, Requests 1 & 2; Ex. 130, Requests 1 & 2.

Dondero, the Dugaboy Trust, and Mr. Akada might also be liable for the full amount of the debt—subject to Highland’s allocation determinations.<sup>90</sup> Based on this evidence, the court makes a logical inference that Reid Collins & Tsai LLP generally has not been paid timely.

53. Next with regard to CT Corporation and the \$517.12 indebtedness that the Alleged Debtors represent is owed, CT Corporation asserts that \$4,074.84 is, in fact, owed to it by Acis LP and Acis GP/LLC.<sup>91</sup> CT Corporation also believes Highland has liability for the Alleged Debtors’ indebtedness.<sup>92</sup> CT Corporation also believes the amount owed to it is undisputed.<sup>93</sup> CT Corporation further represents that its invoices are due upon receipt.<sup>94</sup> CT Corporation produced several invoices in discovery, all showing due upon receipt, and one was dated as far back as December 31, 2016 (in the amount of \$932).<sup>95</sup> Based on this evidence, the court makes a logical inference that CT Corporation expected prompt payment on its invoices and, thus, has not been paid timely.

54. Next with regard to David Simek, the Petitioning Creditor concedes that his \$1,233.19 indebtedness (which is apparently an expense reimbursement relating to some consulting) is not past-due.

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<sup>90</sup> Exh. 90, Questions 13 & 14; Exh. 130, Questions 13-14.

<sup>91</sup> Exh. 143, Questions 12 & 13.

<sup>92</sup> *Id.* at Question 14.

<sup>93</sup> *Id.* at Questions 22 & 23.

<sup>94</sup> *Id.* at Question 30.

<sup>95</sup> *Id.* at p. 8; Exh. 40T.

55. In summary, the evidence reflects that the creditors of the Alleged Debtors are generally not being paid timely (except for perhaps four that are relatively insignificant and which may also be able to look to Highland for payment).<sup>96</sup>

56. Further on the topic of timeliness, Mr. Leventon (Highland's in-house Assistant General Counsel) testified that 96% of bills submitted get paid more than 90 days after they are submitted, that approximately 70% of bills are later than 120 days after they are submitted, and some are even later than 150 days. Mr. Leventon testified that this was a result of Acis LP receiving cash on a quarterly basis from the CLOs. He further elaborated and testified that, for example, if Acis LP got cash on say February 1st, and it received a legal bill on that same day, that he would probably not approve it and allocate it until say February 8th. By that time, Acis LP would have already used up all its cash, and that particular creditor would need to wait until the next quarterly payment was received in order to be paid. He further testified that he explained this to law firms before their engagements and that, if they wanted the business, they would need to understand the process. There are several things the court finds problematic about this testimony. First, no testimony was offered showing that this was, in fact, the understanding of the law firms or other creditors, and, moreover, none of the engagement letters or invoices submitted into evidence reflect such payment terms. Without this additional evidence, the court believes that the Alleged Debtors' testimony regarding how it paid invoices was mostly self-serving and did not support a finding that the Alleged Debtors were generally paying their debts

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<sup>96</sup> Courts have also held that a debtor is generally not paying its debts as they become due when a debtor is found to have been transferring assets so as to avoid paying creditors. *See, e.g., In re Moss*, 249 B.R. 411, 423 (Bankr. N.D. Tex. 2000) (bankruptcy court determined that an alleged debtor was not paying its debts as they came due when the alleged debtor "attempted to delay creditors through the transfers of assets she has made," concluding that "[the alleged debtor's] overall conduct of her financial affairs has been poor"). This court has also found that there may have been significant transfers of the Alleged Debtors' assets prior to the filing of the Involuntary Petitions to potentially avoid paying creditors (*i.e.*, Mr. Terry) and this may provide further support for the court's finding that the Alleged Debtors are generally not paying their debts as they become due under section 303(h).

as they became due.<sup>97</sup> Second, to the extent Mr. Leventon's testimony demonstrates that creditors of the Alleged Debtors expected to be paid on a quarterly basis (at the latest), certain of the remaining 11 creditors have debts that are significantly older than four months (*i.e.*, CT Corporation, Jones Day, AKK, and possibly even Reid Collins & Tsai LLP). Third, the Financial Statements of Acis LP submitted into evidence do not support the notion that the cash balances at Acis LP were only sufficient enough to pay vendors once every quarter.<sup>98</sup> For example, the balance sheet for January 31, 2017 shows a cash balance in Acis LP bank accounts of \$1,061,663.19; the balance sheet for February 28, 2017 shows a cash balance in Acis LP bank accounts of \$905,212.36; the balance sheet for March 31, 2017 shows a cash balance in Acis LP bank accounts of \$525,626.59; the balance sheet for April 30, 2017 shows a cash balance in Acis LP bank accounts of \$117,885.96; the balance sheet for May 31, 2017 shows a cash balance in Acis LP bank accounts of \$62,733.31; the balance sheet for June 30, 2017 shows a cash balance in Acis LP bank accounts of \$10,329.15; the balance sheet for July 31, 2017 shows a cash balance in Acis LP bank accounts of \$701,904.39; the balance sheet for August 31, 2017 shows a cash balance in Acis LP bank accounts of \$332,847.05.<sup>99</sup> In summary, while there may be cash fluctuations with Acis LP, there is not a clear pattern of Acis LP being only able to pay vendors once every quarter.

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<sup>97</sup> See *In re Trans-High Corp.*, 3 B.R. 1, 2-3 (Bankr. S.D.N.Y. 1980) (bankruptcy court found that evidence showing that the petitioning creditor gave the debtor generous terms of payment (90 days) which were substantially better than the terms set forth in the actual writings between the parties supported finding that the alleged debtors were generally paying debts as they became due and that the involuntary petition must be dismissed).

<sup>98</sup> Exh. 147.

<sup>99</sup> *Id.*

## **II. Conclusions of Law**

Section 303 of the Bankruptcy Code sets forth the various requirements for initiating an involuntary bankruptcy case. First, pursuant to section 303(b) of the Bankruptcy Code, an involuntary case may be filed against a person by the filing with the bankruptcy court of a petition under Chapter 7—

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount ... [that] aggregate at least \$15,775 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least \$15,775 of such claims . . .<sup>100</sup>

Thus, if there are twelve or more eligible creditors holding qualified claims on the Petition Date, three or more entities must participate in the involuntary filing and must hold unsecured claims aggregating \$15,775.00. If there are less than twelve creditors, a single creditor with an unsecured claim of \$15,775.00 may file the involuntary petition. To the extent a bankruptcy court finds that the requisite number of petitioning creditors have commenced the involuntary case, the court shall order relief against the debtor under the chapter under which the petition was filed only if “the debtor is generally not paying such debtor’s debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount.”<sup>101</sup>

Here, as noted earlier, the Alleged Debtors have made four arguments as to why an order for relief should not be entered against the Alleged Debtors: (1) the Alleged Debtors have 12 or

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<sup>100</sup> 11 U.S.C.A § 303(b) (West 2018).

<sup>101</sup> 11 U.S.C.A § 303(h) (West 2018).



more creditors, and, thus, with Mr. Terry being the sole petitioning creditor, the Involuntary Petitions were not commenced by the requisite number of creditors; (2) the Alleged Debtors are generally paying their debts as they become due; (3) the Involuntary Petitions were filed in bad faith by Mr. Terry; (4) the interests of creditors and the debtors would be better served by dismissal and the court should abstain pursuant to section 305 of the Bankruptcy Code.

**A. Have the Requisite Number of Creditors Commenced the Involuntary Proceedings?**

Pursuant to section 303(b)(2) of the Bankruptcy Code, a sole petitioning creditor holding at least \$15,775 in claims can initiate an involuntary bankruptcy case so long as the alleged debtors have fewer than 12 creditors. After the Second Amended List of Creditors was filed, Mr. Terry had the burden, by a preponderance of the evidence, of showing that the Alleged Debtors actually had less than 12 qualified creditors.<sup>102</sup> Here, the court has found that the Alleged Debtors have, *at most*, 11 qualified creditors.<sup>103</sup> Accordingly, Mr. Terry has met his burden of showing that the Alleged Debtors have less than 12 creditors for section 303(b) purposes, and that he, as the sole petitioning creditor, was permitted to file the Involuntary Petitions. While Mr. Terry has made additional arguments as to why certain of these 11 creditors should not be counted as creditors for purposes of section 303(b) of the Bankruptcy Code, the court does not believe it necessary to address these arguments at this time.<sup>104</sup>

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<sup>102</sup> See *In re Moss*, 249 B.R. 411, 419 n. 6 (Bankr. N.D. Tex. 2000); *In re Smith*, 415 B.R. 222, 229 (Bankr. N.D. Tex. 2009).

<sup>103</sup> To be clear, the court believes that even on these 11, there are likely bona fide disputes as to the liability or amount that *Acis LP* has—as opposed to the liability or amount that Highland or other insiders bear responsibility.

<sup>104</sup> Moreover, as previously stated, since the court has determined there are fewer than 12 creditors, the court need not address whether there is a “special circumstances” exception to the statutory requirements of section 303, in situations where an alleged debtor may have engaged in fraud, schemes, or artifice to thwart a creditor or creditors. See, e.g., *In re Norriss Bros. Lumber Co.*, 133 B.R. 599 (Bankr. N.D. Tex. 1991); *In re Moss*, 249 B.R. 411 (Bankr. N.D. Tex. 2000); *In re Smith*, 415 B.R. 222 (Bankr. N.D. Tex. 2009).

**B. Are the Alleged Debtors Generally Paying Their Debts as They Become Due?**

Section 303(h) of the Bankruptcy Code requires that a court shall enter order for relief in an involuntary case “if ... (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount . . . .”<sup>105</sup> Again, the burden is on the Petitioning Creditor to prove this element by a preponderance of the evidence.<sup>106</sup> The determination is made as of the filing date of the Involuntary Petitions.<sup>107</sup> In determining whether an alleged debtor is generally paying its debts as they come due, courts typically look to four factors: (i) the number of unpaid claims; (ii) the amount of such claims; (iii) the materiality of the non-payments; and (iv) the nature of the debtor's overall conduct in its financial affairs.<sup>108</sup> No one factor is more meritorious than another; what is most relevant depends on the facts of each case.<sup>109</sup> Courts typically hold that “generally not paying debts” includes regularly missing a significant number of payments *or* regularly missing payments which are significant in amount in relation to the size of the debtor's operation.<sup>110</sup>

<sup>105</sup> 11 U.S.C.A § 303(h) (West 2018).

<sup>106</sup> See *Norris v. Johnson (In re Norris)*, No. 96-30146, 1997 WL 256808, at \*3-\*4 (5th Cir. Apr. 11, 1997) (unpublished).

<sup>107</sup> *Subway Equip. Leasing Corp. v. Sims (In re Sims)*, 994 F.2d 210, 222 (5th Cir. 1993).

<sup>108</sup> See, e.g., *In re Moss*, 249 B.R. 411, 422 (Bankr. N.D. Tex. 2000) (citing *In re Norris*, 183 B.R. 437, 456-57 (Bankr. W.D. La. 1995)).

<sup>109</sup> *In re Bates*, 545 B.R. 183, 186 (Bankr. W.D. Tex. 2016) (also noting that petitioning creditors' counsel consistently argued that the final prong—overall conduct in financial affairs—should be afforded more weight than the other factors, and the court found no authority to support this assertion).

<sup>110</sup> See, e.g., *In re All Media Props., Inc.*, 5 B.R. 126, 143 (Bankr. S.D. Tex. 1980). See also *Concrete Pumping Serv., Inc. v. King Constr. Co. (In re Concrete Pumping Serv., Inc.)*, 943 F.2d 627, 630 (6th Cir.1991) (a debtor was not paying his debts as they became due where the debtor was in default on 100% of its debt to only one creditor); *Knighthood Master Fund, L.P. v. Vitro Packaging, LLC (In re Vitro Asset Corp.)*, No. 3:11–CV–2603–D (N.D.Tex. Aug. 28, 2012) (district court found error in bankruptcy court ruling that the debtors were generally paying their debts as they became due, where bankruptcy court had relied on the fact that the alleged debtors had a significant number of third-party creditors/trade vendors, which had been continually paid, even though the unpaid debts to the petitioning creditors far exceeded the paid debts in terms of dollar amount; petitioning creditors were holders of promissory notes that were guaranteed by the alleged debtors, as to which the primary obligor and alleged

Furthermore, any debt which the alleged debtor is not current on as of the petition date should be considered as a debt not being paid as it became due.<sup>111</sup>

Here, the court concludes that the creditors of the Alleged Debtors—what few there are—are generally not being paid as their debts have become due (except for perhaps four<sup>112</sup> that are relatively insignificant and which may also be able to look to Highland for payment). Mr. Terry has met his burden by a preponderance of the evidence as to section 303(h) of the Bankruptcy Code.

**C. *With the Section 303 Statutory Requirements Being Met by the Petitioning Creditor, Should the Court, Nonetheless, Dismiss the Involuntary Petitions Because They Were Filed in Bad Faith?***

Despite Mr. Terry meeting the necessary statutory requirements for this court to enter orders for relief as to the Alleged Debtors pursuant to section 303 of the Bankruptcy Code, the Alleged Debtors have argued that the Involuntary Petitions must, nonetheless, be dismissed because they were filed in “bad faith” by Mr. Terry. As support for this argument, the Alleged Debtors rely primarily on the Third Circuit’s decision in *In re Forever Green Athletic Fields, Inc.*, 804 F.3d 328 (3d Cir. 2015). While the court certainly acknowledges that authority exists in other circuits that suggests that dismissal of an involuntary bankruptcy case may be appropriate—even when section 303’s statutory requirements have been met—based upon an

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debtors had ceased making interest payments; the unpaid debts represented 99.9% of the total dollar amount of debt of each of the alleged debtors); *Crown Heights Jewish Cmty. Council, Inc. v. Fischer (In re Fischer)*, 202 B.R. 341, 350–51 (E.D.N.Y. 1996) (even though the debtor only had two outstanding debts, the total dollar amount failed to establish that, in terms of dollar amounts, the debtor was paying anywhere close to 50% of his liabilities, so he was not generally paying his debts as they became due); *In re Smith*, 415 B.R. 222, 231 (Bankr. N.D. Tex. 2009) (while the debtor was paying small recurring debts, he was not paying 99 percent of his debts in the aggregate amount and thus was not generally paying his debts as they became due).

<sup>111</sup> *In re Bates*, 545 B.R. 183, 188 (Bankr. W.D. Tex. 2016).

<sup>112</sup> Those four are: Drexel Limited (\$6,359.96); Highfield Equities (\$2,510.04); David Simek (\$1,233.19); and McKool Smith (\$70,082.18).

independent finding of “bad faith,” the court need not ultimately decide the efficacy or applicability of such authority, because the court does not believe that the evidence demonstrated any “bad faith” on the part of Mr. Terry (or his counsel) in filing the Involuntary Petitions. Indeed, the evidence suggested that Mr. Terry and his counsel filed the Involuntary Petitions out of a legitimate concern that Highland was dismantling and denuding Acis LP of all of its assets and value and that a bankruptcy filing was the most effective and efficient way to preserve value for the Acis LP creditors. The court concludes that Mr. Terry was wholly justified in pursuing the Involuntary Petitions.

***D. Should This Court, Nonetheless, Abstain and Dismiss the Involuntary Petitions Pursuant to Section 305 of the Bankruptcy Code?***

Section 305(a)(1) of the Bankruptcy Code provides that:

- (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—  
(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; . . .<sup>113</sup>

Courts construing section 305(a)(1) of the Bankruptcy Code have found that abstention in a properly filed bankruptcy case is an *extraordinary remedy*.<sup>114</sup> Moreover, granting an abstention motion pursuant to section 305(a)(1) of the Bankruptcy Code requires more than a simple balancing of harm to the debtor and creditors; rather, the interests of *both* the *debtor* and its *creditors* must be served by granting the request to abstain.<sup>115</sup> The moving party bears the

<sup>113</sup> 11 U.S.C.A. § 305(a)(1) (West 2018).

<sup>114</sup> *In re AMC Investors, LLC*, 406 B.R. 478, 487 (Bankr. D. Del. 2009); *see also In re Compania de Alimentos Fargo, S.A.*, 376 B.R. 427, 434 (Bankr. S.D.N.Y. 2007); *In re 801 S. Wells St. Ltd. P’ship*, 192 B.R. 718, 726 (Bankr. N.D. Ill. 1996).

<sup>115</sup> *In re Smith*, 415 B.R. 222, 238-39 (Bankr. N.D. Tex. 2009) (citing to *AMC Investors, LLC*, 406 B.R. at 488).

burden to demonstrate that dismissal benefits the debtor and its creditors.<sup>116</sup> Courts must look to the individual facts of each case to determine whether abstention is appropriate.<sup>117</sup>

Case law has set forth a litany of factors to be considered by the court to gauge the overall best interests of the creditors and the debtor for section 305(a)(1) purposes:

- (1) the economy and efficiency of administration;
- (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court;
- (3) whether federal proceedings are necessary to reach a just and equitable solution;
- (4) whether there is an alternative means of achieving an equitable distribution of assets;
- (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case;
- (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and
- (7) the purpose for which bankruptcy jurisdiction has been sought.<sup>118</sup>

While all factors are considered, not all are given equal weight in every case and the court should not conduct a strict balancing.<sup>119</sup>

*i. Factor 1: The Economy and Efficiency of Administration.*

<sup>116</sup> *In re Monitor Single Lift I, Ltd.*, 381 B.R. 455, 462-63 (Bankr. S.D.N.Y. 2008).

<sup>117</sup> *In re Spade*, 258 B.R. 221, 231 (Bankr. D. Colo. 2001).

<sup>118</sup> *Monitor Single Lift I, Ltd.*, 381 B.R. at 464-65 (citing to *In re Paper I Partners, L.P.*, 283 B.R. 661, 679 (Bankr. S.D.N.Y. 2002)); see also *Smith*, 415 B.R. at 239; *AMC Investors, LLC*, 406 B.R. at 488; *In re Euro-American Lodging Corp.*, 357 B.R. 700, 729 (Bankr. S.D.N.Y. 2007); but see *Spade*, 258 B.R. at 231-32 (Bankr. D. Colo. 2001) (applied a four criteria test in evaluating section 305 abstention which included: (1) the motivation of the parties who sought bankruptcy jurisdiction; (2) whether another forum was available to protect the interests of both parties or there was already a pending proceeding in state court; (3) the economy and efficiency of administration; and (4) the prejudice to the parties). The Alleged Debtors cite to the case of *In re Murray*, 543 B.R. 484 (Bankr. S.D.N.Y. 2016), in particular, as support for why this court should abstain under section 305(a) of the Bankruptcy Code and dismiss the Involuntary Petitions. However, in *Murray*, Judge Gerber was analyzing dismissal of an involuntary proceeding pursuant to section 707 of the Bankruptcy Code, more specifically for “cause,” and not based upon abstention under section 305(a) of the Bankruptcy Code. Thus, the court is not convinced *Murray* is relevant to this court’s section 305 abstention analysis.

<sup>119</sup> *In re TPG Troy, LLC*, 492 B.R. 150, 160 (Bankr. S.D.N.Y. 2013) (citing *Monitor Single Lift*, 381 B.R. at 464).

The economy and efficiency of administering a case in the bankruptcy court is routinely evaluated in considering abstention under section 305 of the Bankruptcy Code. Here, the evidence suggests that the most economical and efficient forum for these parties to resolve their disputes is the bankruptcy court. The court heard ample evidence that the Alleged Debtors are already, essentially, in the process of being liquidated by Highland. This is not a situation where an ably-functioning, going-concern business is being foisted in disruptive fashion into a bankruptcy.<sup>120</sup> Because of the fact that the Alleged Debtors are already in the process of being liquidated, the bankruptcy court (and not a state court) is the most efficient and economical forum to complete this liquidation and distribute whatever assets remain to creditors in accordance with the distribution scheme set forth in the Bankruptcy Code and with the oversight of a neutral third-party trustee. Thus, with the bankruptcy court being the more economic and efficient forum for administering this case, this factor goes against abstention.

- ii. *Factors 2, 3, 4, 5, and 6: Whether Another Forum is Available to Protect the Interests of Both Parties or There is Already a Pending Proceeding in State Court; Whether Federal Proceedings are Necessary to Reach a Just and Equitable Solution; Whether There is an Alternative Means of Achieving an Equitable Distribution of Assets; Whether the Debtor and the Creditors are Able to Work Out a Less Expensive Out-of-Court Arrangement Which Better Serves All Interests in the Case; and Whether a Non-Federal Insolvency Has Proceeded so Far in Those Proceedings That it Would Be Costly and Time Consuming to Start Afresh With the Federal Bankruptcy Process.*

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<sup>120</sup> See, e.g., *In re The Ceiling Fan Distrib., Inc.*, 37 B.R. 701 (Bankr. M.D. La. 1983) (noting that while the dissection of a living business may not properly be the business of a bankruptcy court, the division of a “carcass” and the reclamation of pre-petition gouging may well be); *In re Bos*, 561 B.R. 868, 898-99 (Bankr. N.D. Fla. 2016) (citing as one of the reasons to abstain under section 305 of the Bankruptcy Code the fact that entities and subsidiaries under the alleged debtor’s umbrella were still operating successful businesses and had employed more than 500 people); but see *Remex Elecs. Ltd. v. Axl Indus., Inc. (In re Axl Indus., Inc.)*, 127 B.R. 482, 484-86 (S.D. Fla. 1991) (in affirming the bankruptcy court’s decision to dismiss an involuntary bankruptcy case, the district court also found that “the interests of a defunct business enterprise would be little affected by the pendency of a bankruptcy proceeding,” which the district court believed favored abstention).

The court believes that factors 2-6 should be grouped together for purposes of its abstention analysis, since all of these factors specifically touch on the availability of an alternative forum to achieve an *equitable* distribution.<sup>121</sup> By way of example, where bringing a case into the bankruptcy court would simply add an additional layer of expense to the resolution of a two-party dispute and another forum already provides a suitable place to resolve the dispute, some courts have found that abstention is the more appropriate choice since keeping the case would transform the bankruptcy process into a collection device.<sup>122</sup> Here, the Alleged Debtors have repeatedly argued that, because there is already pending state court litigation involving Mr. Terry, Highland, and the Alleged Debtors, these cases should be dismissed and the parties should go back to state court to resolve their issues. The court does not agree for several reasons.

First, it is worth noting that this court has already heard multiple days of evidence in this case (including almost five days just for the Trial) and would certainly not be “starting afresh” by any means if things go forward in the bankruptcy court. Additionally, while the Alleged Debtors have argued that a significant amount of attorney’s fees have already been spent litigating this case in state court (which they believe supports abstention), the court surmises that these fees have not been wasted dollars, as the money expended by the parties developed discovery of facts that could assist a bankruptcy trustee in pursuing avoidance actions that may be viable and might lead to value that could pay creditors’ claims.<sup>123</sup>

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<sup>121</sup> See, e.g., *In re Monitor Single Lift I, Ltd.*, 381 B.R. 455, 460-70 (Bankr. S.D.N.Y. 2008).

<sup>122</sup> *AMC Investors, LLC*, 406 B.R. at 488; see also *Axl Indus., Inc.*, 127 B.R. at 484-86.

<sup>123</sup> See, e.g., *The Ceiling Fan Distributor, Inc.*, 37 B.R. at 703 (the court noted that, despite there being significant legal expenses in the state court, such expenses were not wasted since the legal work done to date would be quite helpful to a trustee).



Second, this court heard considerable evidence involving potentially voidable transfers that may have occurred involving the Alleged Debtors and Highland/Highland-affiliates and, while the state court certainly provides a forum for eventually bringing fraudulent transfer claims, the court also heard evidence that none of these claims have actually been brought in the state court.<sup>124</sup> Moreover, to the extent fraudulent transfer claims were to be pursued in state court and were successful, the state court would still need the ability to reach the assets of alleged fraudulent transfer recipients (which, in this situation, include certain Highland-affiliates located in the Cayman Islands). The bankruptcy court has concerns whether a state court process could efficiently accomplish this task.<sup>125</sup> Similarly, it is worth noting that, while a request for a receiver was filed in the state court by Mr. Terry, such request had not yet been heard and decided by the state court. Thus, at the present time, it does not appear that there is an alternative forum to address the pertinent issues in this case, without the necessity of significant, additional steps being taken by the parties in the state court.

Third, this court believes that a federal bankruptcy proceeding is necessary in order to achieve an equitable result in this case. Specifically, the court heard evidence from the Alleged Debtors that, if this court chose to abstain and dismiss the Involuntary Petitions, the Alleged Debtors would ultimately pay all of their creditors in full, except for Mr. Terry. This clearly demonstrates how keeping the case in the bankruptcy court is necessary to allow an equitable

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<sup>124</sup> See, e.g., *In re Texas EMC Mgmt., LLC*, Nos. 11-40008 & 11-40017, 2012 WL 627844, at \*3 (Bankr. S.D. Tex. 2012) (noting that one of the reasons abstention was proper under section 305 of the Bankruptcy Code was because the issues to be litigated amongst the parties were already joined in the state court litigation); *Spade*, 258 B.R. at 236 (court held that one of the reasons abstention was warranted under section 305 of the Bankruptcy Code was because the petitioning creditors had already filed and had pending a “collection case” in the state court).

<sup>125</sup> See, e.g., *Smith*, 415 B.R. at 239 (the bankruptcy court held that there “are remedies under the Bankruptcy Code that are not available to Rhodes under state law, due to Mr. Smith's transfer of the majority of his assets to the Cook Island Trust,” and “federal proceedings may be necessary to reach a just and equitable solution”).



distribution to *all creditors*, including Mr. Terry. Additionally, a federal bankruptcy court has certain tools available to it that are not available to a state court such as the ability to invalidate potential *ipso facto* clauses in contracts pursuant to section 365 of the Bankruptcy Code, sell assets free and clear of liens, claims and encumbrances pursuant to section 363 of the Bankruptcy Code, and impose the automatic stay pursuant to section 362 of the Bankruptcy Code. These are all useful tools available to the Alleged Debtors in a bankruptcy case that would be lost if this court were to ultimately abstain.

Finally, there was more than enough evidence showing the acrimonious and bitter relationship that exists between Mr. Terry and Mr. Dondero. Thus, the availability of an out-of-court arrangement being obtained in this case is, in this court's mind, slim to none.

In summation, the court finds that all of the factors above support this case staying with the bankruptcy court.

iii. *Factor 7: The Purpose for Which Bankruptcy Jurisdiction Has Been Sought.*

The Alleged Debtors have repeatedly argued that Mr. Terry filed this case in bad faith and as a litigation tactic to gain some sort of advantage in the state court proceedings. The court has already found above that these cases were not filed in bad faith and that Mr. Terry has met the necessary statutory requirements of section 303 of the Bankruptcy Code. Moreover, it is worth noting that at least one court has stated that the filing of an involuntary bankruptcy petition is always a "litigation tactic," but whether the filing is inappropriate for abstention purposes is a fact-dependent determination.<sup>126</sup> Here, the facts show that there was no inappropriateness

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<sup>126</sup> *In re Marciano*, 459 B.R. 27, 50 (B.A.P. 9th Cir. 2011) (noting that while the filing of the involuntary bankruptcy was a litigation tactic, the bankruptcy court did not abuse its discretion in denying the alleged debtor's motion to dismiss based upon the bankruptcy court's primary concern that the issue of equality of distribution would not effectively be dealt with in another forum).

behind Mr. Terry’s decision to file the Involuntary Petitions. Specifically, Mr. Terry repeatedly and credibly testified that the purpose for filing the Involuntary Petitions was to ensure that creditors (including him) were treated fairly and received an equal distribution from the Alleged Debtors’ assets, not to gain some sort of advantage in the state court. This testimony was absolutely consistent with additional evidence showing that, since the entry of the arbitration award, there has been a calculated effort (largely by Highland) to effectively liquidate the Alleged Debtors. Unlike the bankruptcy court in *In re Selectron Mgmt. Corp.*,<sup>127</sup> which had no evidence or “smoking gun” showing that steps were being taken by the alleged debtor to evade payment on the petitioning creditor’s judgment, thereby necessitating abstention, this court has heard ample evidence showing that the Alleged Debtors, with the aid of Highland, were transferring assets away from the Alleged Debtors, so that Mr. Terry would have nowhere to look at the end of the day.

In light of the court’s analysis of all the seven factors above, the Alleged Debtors have not credibly shown how both the Alleged Debtors and the creditors are better served outside of bankruptcy. If this matter were to remain outside of bankruptcy, there seems to be a legitimate prospect that the Alleged Debtors and Highland will continue dismantling the Alleged Debtors, to the detriment of Acis LP creditors. Abstention would fly in the face of fundamental fairness and the principles underlying the Bankruptcy Code.

Beyond just addressing the factors above, the Alleged Debtors have also argued that, if this court were to not abstain under section 305 of the Bankruptcy Code, there would be

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<sup>127</sup> *In re Selectron Mgmt. Corp.*, No. 10-75320-DTE, 2010 WL 3811863, at \*6-7 (Bankr. E.D.N.Y. Sept. 27, 2010); *see also In re White Nile Software, Inc.*, No. 08-33325-SGJ-11, 2008 WL 5213393, at \*4 (Bankr. N.D. Tex. Sept. 16, 2008) (finding that where the filing of a voluntary chapter 11 did not appear to be about insuring a distribution to creditors or winding down or giving a soft landing to a business or avoiding dismantling and dissipation of valuable assets or preserving avoidance actions, but rather was about changing the forum of ongoing litigation between the parties, abstention under section 305 was proper).

significant harm to the “equity” of the Alleged Debtors. Specifically, the Alleged Debtors have argued that, if this court were to enter orders for relief, the equity would be forced to “call” and ultimately liquidate CLO 2014-3 (and perhaps all of the CLOs Acis LP manages), resulting in substantial losses to the equity on their investments. First, to be clear, the current equity of the Alleged Debtors is being held by a Highland-affiliate called Neutra, Ltd., which actually only became the equity of the Alleged Debtors on December 19, 2017. But this is not the “equity” being referred to by the Alleged Debtors in its argument. Rather, the so-called “equity,” about which the Alleged Debtors seemed so concerned, is actually *certain parties that own the equity of the entity that owns the equity in the CLOs*—which includes (a) an unnamed third-party investor out of Boston (49%),<sup>128</sup> (b) a charitable foundation managed by a Highland-affiliate (49%), and (c) Highland employees (2%). However, abstention under section 305 of the Bankruptcy Code does not require this court to look at what is in the best interests of these third-parties (who are not current creditors or interest holders of the Alleged Debtors), but rather what is in the best interests of the Alleged Debtors and the creditors. Accordingly, the Alleged Debtors’ effort to argue potential harm to these parties is misplaced for purposes of evaluating abstention under section 305 of the Bankruptcy Code, and, if anything, further highlights who the Alleged Debtors are really out to protect—Highland and Highland-affiliates. Moreover, the court would note that, even if there were to be a “call” and liquidation of CLO 2014-3, thereby ending the Alleged Debtors’ right to receive future management fees, there would still be potential assets for a chapter 7 trustee to administer such as chapter 5 causes of action (which include fraudulent transfers) as well as the Alleged Debtors’ contingent claim for approximately

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<sup>128</sup> Notably, this entity never appeared at the Trial or filed papers stating that it would be harmed by entry of orders for relief in these cases.

\$3 million in expense reimbursement owing by Highland CLO Management Ltd., as part of the November 3, 2017 transfer of the Acis LP Note Receivable from Highland. Thus, even if the so-called doomsday scenario of an equity call on CLO 2014-3 (or other CLOs) were to happen, there is still a potential benefit to creditors if this court chooses not to abstain.

### **III. CONCLUSION**

In conclusion, these involuntary proceedings were appropriately filed under section 303, and orders for relief will be issued forthwith. This court declines to exercise its discretion to abstain, because a chapter 7 trustee appears necessary to halt the post-Arbitration Award transactions and transfers of value out of Acis LP, as discussed above. A chapter 7 trustee appears necessary to resolve the inherent conflicts of interest between the Alleged Debtors and Highland. A chapter 7 trustee will have tools available to preserve value that a state court receiver will not have. The bankruptcy court is single handedly the most efficient place to administer property of the estate for creditors. This is not just a two party dispute between Mr. Terry and the Alleged Debtors, and even if it were, dismissal or abstention is clearly not warranted.

**###END OF FINDINGS OF FACT AND CONCLUSIONS OF LAW###**

**Exhibit D**

**Acis Arbitration Opinion**



CLERK, U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

**ENTERED**

THE DATE OF ENTRY IS ON  
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed April 16, 2019

*Harry G. C. Gann*  
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>IN RE:</b>	§	
	§	
<b>ACIS CAPITAL MANAGEMENT, L.P.,</b>	§	<b>CASE NO. 18-30264-SGJ-11</b>
<b>ACIS CAPITAL MANAGEMENT, GP,</b>	§	<b>CASE NO. 18-30265-SGJ-11</b>
<b>LLC,</b>	§	<b>(Jointly Administered Under</b>
<b>Debtors.</b>	§	<b>Case No. 18-30264-SGJ-11)</b>
	§	<b>(Chapter 11)</b>
	§	
<b>ROBIN PHELAN, CHAPTER 11</b>	§	
<b>TRUSTEE,</b>	§	
<b>Plaintiff,</b>	§	
	§	
<b>VS.</b>	§	<b>ADVERSARY NO. 18-03078-SGJ</b>
	§	
<b>HIGHLAND CAPITAL MANAGEMENT,</b>	§	
<b>L.P., HIGHLAND CLO FUNDING</b>	§	
<b>LTD, HIGHLAND HCF ADVISOR, LTD.,</b>	§	
<b>HIGHLAND CLO MANAGEMENT, LTD.,</b>	§	
<b>and HIGHLAND CLO HOLDINGS, LTD.,</b>	§	
<b>Defendants.</b>	§	

**MEMORANDUM OPINION AND ORDER DENYING MOTION TO COMPEL  
ARBITRATION [DE # 102]**

## **I. Introduction.**

Before this court is a Motion to Compel Arbitration (the “Arbitration Motion”),<sup>1</sup> requesting that the bankruptcy court send to arbitration only a **sub-set** of claims asserted in the above-referenced adversary proceeding (the “Adversary Proceeding”). Some procedural context is crucial in analyzing the merits of the Arbitration Motion and, thus, is set forth immediately below.

This Adversary Proceeding has morphed into a large, complex lawsuit—at this stage primarily involving 35 claims, 20 of which are grounded in fraudulent transfer theories.<sup>2</sup> The Arbitration Motion, as explained below, seeks arbitration of **eight** of the 35 claims (*i.e.*, Counts 1-8).

The Arbitration Motion was filed by party Highland Capital Management, L.P. (“Highland”). Highland and a related company, Highland CLO Funding Ltd. (“HCLOF”), were originally the plaintiffs in this Adversary Proceeding, suing the Chapter 11 Trustee for injunctive relief (arguing early during the above-referenced Chapter 11 bankruptcy cases that the Chapter 11 Trustee was interfering with their business rights and decisions, essentially). The Chapter 11 Trustee fired back with 35 counterclaims against Highland and HCLOF (adding three parties related to Highland as third-party defendants with regard to some of those 35 counterclaims). Notably, these 35 counterclaims—**as directed toward Highland**—were also alleged to be objections to Highland’s two \$4,672,140.38 proofs of claim filed in the underlying bankruptcy cases.<sup>3</sup> In that regard, the Chapter 11 Trustee stated that his Answer and Counterclaims included

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<sup>1</sup> DE # 102.

<sup>2</sup> There is also a preference count and a section 550 recovery count—thus, 22 out of the 35 claims are chapter 5 avoidance actions and recovery. 11 U.S.C. §§ 544, 547, 548 & 550.

<sup>3</sup> See *Defendant's Amended Answer, Counterclaims (Including Claim Objections) and Third-Party Claims* (DE # 84), filed November 13, 2018, in response to the *Original Complaint and Request for Preliminary Injunction of*

“an objection to Highland Capital's proofs of claim pursuant to Federal Rule of Bankruptcy Procedure 3007(b), and the counterclaims asserted herein shall constitute recoupment and/or offset to such proofs of claim, to the extent such claims are otherwise allowed.”<sup>4</sup> In fact, after the 35 counts were articulated in the Chapter 11 Trustee's Answer and Counterclaims, there were 20 paragraphs (¶¶ 252-271, pp. 70-77) solely articulating the Chapter 11 Trustee's objections to Highland's proofs of claim.<sup>5</sup> The Chapter 11 Trustee also filed yet a separate adversary proceeding, Adv. Proc. No. 18-03212, seeking his own injunctive relief, which has recently been consolidated with this Adversary Proceeding.<sup>6</sup>

The Chapter 11 Trustee ultimately proposed and obtained confirmation of a Chapter 11 plan in the underlying bankruptcy cases, and the Reorganized Debtors, now under new ownership and management, were vested in that plan with the counterclaims in this Adversary Proceeding (among other rights and claims). The injunctive relief initially sought by Highland and HCLOF, as plaintiffs in the Adversary Proceeding, later became mooted by various orders in

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*Highland CLO Funding, Ltd and Highland Capital Management Against Chapter 11 Trustee of Acis Capital Management, L.P. and Acis Capital Management GP, LLC* (DE # 1), filed May 30, 2018, and also in response to the proofs of claims filed by Highland Capital Management, L.P. (see *Proof of Claim No. 27*, filed in Case No. 18-30264, and *Proof of Claim No. 13* filed in Case No. 18-30265, each in the amount of \$4,672,140.38, with the basis of each of the proofs of claim listed as “Sub-Advisory Services and Shared Services”; these proofs of claim are virtually identical).

<sup>4</sup> DE # 84, ¶ 6. The Chapter 11 Trustee has argued that the Highland proofs of claim should be disallowed under (i) section 502(b)(1) of the Bankruptcy Code (in that the Highland proofs of claim are allegedly unenforceable against the Debtors under the limited partnership agreement of Acis Capital Management, L.P. and applicable law); (ii) section 502(b)(4) of the Bankruptcy Code (in that the proofs of claim are for services of an insider of the Debtors and allegedly exceed the reasonable value of the services); and (iii) under section 502(d) of the Bankruptcy Code (in that the Trustee has asserted avoidance actions against Highland). Finally, to the extent allowed at all, the Trustee has argued that the Highland proofs of claim should be equitably subordinated under section 510(c) of the Bankruptcy Code. In summary, pursuant to section 502(b) and (d) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 3007, the Trustee has sought entry of an order disallowing and expunging the Highland proofs of claim from the Debtors' claims registers. See *id.* at ¶¶ 251-272.

<sup>5</sup> *Id.*

<sup>6</sup> DE # 124.



the bankruptcy cases and such claims were voluntarily dismissed without prejudice.<sup>7</sup> Thus, Highland, which is pursuing the Arbitration Motion, now wears the hat of only a defendant (and proof of claimant), and the Reorganized Debtors are the plaintiffs asserting the 35 original “counterclaims” asserted by the Chapter 11 Trustee against Highland (which 35 claims are also objections to Highland’s proof of claim). The separate adversary proceeding that was filed by the Chapter 11 Trustee seeking injunctive relief (Adv. Proc. No 18-03212) was consolidated into this Adversary Proceeding, and the style of this Adversary Proceeding was adjusted to reflect that the Chapter 11 Trustee had become situated as plaintiff.<sup>8</sup> But, to be clear, the Reorganized Debtors are actually now plaintiffs in place of the Chapter 11 Trustee. The Reorganized Debtors are Acis Capital Management, L.P. (“Acis LP”) and Acis Capital Management GP, LLC (“Acis GP”), and they oppose the Arbitration Motion.<sup>9</sup>

Citing to the Federal Arbitration Act (the “FAA”), 9 U.S.C. § 1 *et seq.*, Highland argues that the bankruptcy court must enter an order compelling arbitration as to counts 1-8 because: (a) these eight counts revolve around the interpretation of certain prior versions of a Sub-Advisory Agreement and Shared Services Agreement (later defined); and (b) the aforementioned agreements contained binding arbitration clauses. Highland also requests that the Adversary Proceeding be stayed regarding counts 1-8, pending binding arbitration. The Reorganized Debtors dispute that there are binding arbitration clauses applicable to counts 1-8. As explained further below, the aforementioned agreements were amended many times and the arbitration clauses were eventually eliminated in the last versions of the agreements. The Reorganized

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<sup>7</sup> DE # 79.

<sup>8</sup> DE # 124.

<sup>9</sup> DE # 123.

Debtors also urge that, even if there are applicable arbitration clauses, the court may and should exercise discretion and decline to order arbitration, since core bankruptcy matters are involved and arbitration would conflict with the purposes of the Bankruptcy Code. For the reasons set forth below, the Arbitration Motion is denied. This means that Counts 1-26 & 33-35 will go forward and be adjudicated in this Adversary Proceeding.<sup>10</sup> But as will be explained in a separate order that is being issued shortly following this order, there are certain counts complaining of *postpetition* state law torts and breaches of contract in this Adversary Proceeding (Counts 27-32) that this court believes should be separated out into a different adversary proceeding and consolidated with a contested matter involving a Highland request for allowance of a postpetition administrative expense claim [DE # 772].

## **II. Background Facts.**

### **A. First, the Agreements Between the Parties.**

As this court has noted on various occasions, Acis LP was formed in the year 2011, and is primarily a CLO portfolio manager.<sup>11</sup> Specifically, Acis LP provides fund management services to various special purpose entities that hold CLOs (which is an acronym for “collateralized loan obligations”). Acis LP was providing management services for five such special purpose entities (the “Acis CLOs”) as of the time that it and its general partner were put into the above-referenced involuntary bankruptcy cases (the “Bankruptcy Cases”). The parties have informally referred to the special purpose entities themselves as the “CLO Issuers” or “CLO Co-Issuers” but, to be clear, these special purpose entities (hereinafter, the “CLO SPEs”)

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<sup>10</sup> The court notes that a Supplemental Motion to Withdraw the Reference in this Adversary Proceeding has recently been filed by Highland and HCLOF [DE # 134] and that motion will be addressed in due course hereafter. The ruling herein with regard to the Arbitration Motion does not affect such motion and such motion will be separately addressed, after a status conference, and through a report and recommendation to the District Court.

<sup>11</sup> Acis LP has managed other funds, from time to time, besides CLOs.

are structured as follows: (a) on the asset side of their balance sheets, the entities own pieces of senior debt owed by large corporations and, therefore, earn revenue from the variable interest payments made by those corporations on such senior debt; and (b) on the liability side of their balance sheets, the entities have obligations in the form of notes (*i.e.*, tranches of fixed interest rate notes) on which the CLO SPEs themselves are obligated—the holders of which notes are mostly institutions and pension funds. The CLO SPEs make a profit, based on the spread or “delta” between: (a) the variable rates of interest paid on the assets that the CLO SPEs own (*i.e.*, the basket of senior notes); and (b) the fixed rates of interest that the CLO SPEs must pay on their own tranches of debt. At the bottom of the CLO SPEs’ capital structure is their equity (sometimes referred to as “subordinated notes,” but these “notes” are genuinely equity). As portfolio manager, Acis LP manages the CLO SPEs’ pools of assets (by buying and selling senior loans to hold in the CLO SPEs’ portfolios) and communicates with investors in the CLO SPEs. The CLO SPEs’ tranches of notes are traded on the Over-the-Counter market.

To be perfectly clear, none of the CLO SPEs themselves have been in bankruptcy. Only Acis LP which *manages* the CLO business and its general partner, Acis GP, were put into bankruptcy.

Historically, Acis LP has had four main sets of contracts that were at the heart of its business and allowed it to function. They are described below. The second and third agreements set forth below are highly relevant to the Arbitration Motion before the court. The Chapter 11 Trustee, from time-to-time, credibly testified that these agreements collectively created an “eco-system” that allowed the Acis CLOs to be effectively and efficiently managed by Acis LP.

1. The PMAs with the CLO SPEs.

First, Acis LP has various portfolio management agreements (“PMAs”) *with the CLO SPEs*, pursuant to which Acis LP earns management fees. The PMAs have been the primary “assets” (loosely speaking) of Acis LP. They are what generate revenue for Acis LP.

2. The Sub-Advisory Agreement with Highland.

Second, Acis LP had a Sub-Advisory Agreement (herein so called) with *Highland*. Pursuant to this agreement, Acis LP essentially sub-contracted for the use of Highland front-office personnel/advisors to perform management services for Acis LP (*i.e.*, so that Acis LP could fulfill its obligations to the CLO SPEs under the PMAs). Acis LP paid handsome fees to Highland pursuant to this agreement. This agreement was rejected (with bankruptcy court approval) by the Chapter 11 Trustee during the Bankruptcy Cases, when the Chapter 11 Trustee credibly represented that he had not only found resources to provide these services at a much lower cost to the estate, but he also had begun to believe that Highland was engaging in stealth efforts to liquidate the Acis CLOs, to the detriment of Acis LP’s creditors.

*There were five iterations of the Sub-Advisory Agreement between the parties over time:* (a) the initial Sub-Advisory Agreement, “made effective January 1, 2011” (which had an arbitration clause at section 16(f));<sup>12</sup> (b) an Amended and Restated Sub-Advisory Agreement, “made” May 5, 2011, “to be effective January 1, 2011” (which also had an arbitration clause at section 16(f))<sup>13</sup>; (c) an Amendment to Amended and Restated Sub-Advisory Agreement “entered into as of” July 1, 2011 (which did not seem to affect in any way the aforementioned arbitration

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<sup>12</sup> Exh. 1 to Arbitration Motion.

<sup>13</sup> Exh. 2 to Arbitration Motion.

clause);<sup>14</sup> (d) Second Amended and Restated Sub-Advisory Agreement “made” on July 29, 2016, “to be effective January 1, 2016” (which had an arbitration clause at section 16(f));<sup>15</sup> and (e) the Third Amended and Restated Sub-Advisory Agreement “dated as of March 17, 2017” (*which suddenly contained no arbitration clause, with no explanation*).<sup>16</sup>

3. The Shared Services Agreement with Highland.

Third, Acis LP also had a Shared Services Agreement (herein so called) with Highland, pursuant to which Acis LP essentially sub-contracted for the use of Highland’s back-office services (again, so that Acis LP could fulfill its obligations to the CLO SPEs under the PMAs). To be clear, Acis LP had no employees of its own—only a couple of officers and members. Acis LP paid handsome fees to Highland for the personnel and back-office services that Highland provided to Acis LP. This agreement was also rejected by the Chapter 11 Trustee during the Bankruptcy Cases (with Bankruptcy Court approval) for the same reasons that the Sub-Advisory Agreement with Highland was rejected.

*There were five iterations of the Shared Services Agreement between the parties over time:* (a) the initial Shared Services Agreement “effective as of January 1, 2011” (which had an arbitration clause at section 9.14);<sup>17</sup> (b) an Amendment to Shared Services Agreement, “entered into as of” July 1, 2011 (which did not seem to affect in any way the aforementioned arbitration clause);<sup>18</sup> (c) a Second Amended and Restated Shared Services Agreement “dated effective

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<sup>14</sup> Exh. 3 to Arbitration Motion.

<sup>15</sup> Exh. 4 to Arbitration Motion.

<sup>16</sup> Exh. 5 to Arbitration Motion.

<sup>17</sup> Exh. 6 to Arbitration Motion.

<sup>18</sup> Exh. 7 to Arbitration Motion.

January 1, 2015” (which had an arbitration clause at section 9.14);<sup>19</sup> (d) a Third Amended and Restated Shared Services Agreement “dated effective as of January 1, 2016 (which had an arbitration clause at section 9.14);<sup>20</sup> and (e) a Fourth Amended and Restated Shared Services Agreement “dated as of March 17, 2017” (*which suddenly contained no arbitration clause, with no explanation*).<sup>21</sup>

4. The Equity/ALF-PMA.

Fourth, until a few weeks before the Bankruptcy Cases were filed, Acis LP also had yet another portfolio management agreement (distinct from its PMAs with the CLO SPEs) whereby Acis LP provided services not just to the CLO SPEs themselves, but separately to the equity holder in the CLO SPEs. This portfolio management agreement with the equity holder in the CLO SPEs is sometimes referred to by the parties as the “ALF PMA,” but it would probably be easier to refer to it as the “Equity PMA”<sup>22</sup> (for ease of reference, the court will refer to it as the “Equity/ALF PMA”). Acis LP did not earn a specific fee pursuant to the Equity/ALF PMA, but the Chapter 11 Trustee and others credibly testified during the Bankruptcy Cases that Acis LP considered the agreement valuable and very important, because it essentially gave Acis LP the ability to control the whole Acis CLO eco-system—in other words, it gave Acis LP the ability to make substantial decisions on behalf of the CLO SPEs’ *equity*—distinct from making decisions for the CLO SPEs themselves pursuant to the PMAs. In any event, shortly before the Bankruptcy Cases were filed, agents of Highland and/or others controlling Acis LP: (a) caused

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<sup>19</sup> Exh. 8 to Arbitration Motion.

<sup>20</sup> Exh. 9 to Arbitration Motion.

<sup>21</sup> Exh. 10 to Arbitration Motion.

<sup>22</sup> There were actually different iterations of the Equity/ALF PMA including one dated August 10, 2015, and another dated December 22, 2016.

Acis LP to terminate this Equity/ALF PMA; and (b) then caused the equity owner to enter into a new Equity PMA with a newly formed offshore entity called Highland HCF Advisor, Ltd. (one of the Defendants in this Adversary Proceeding).

5. Limited Partnership Agreement of Acis LP.

There is actually a fifth agreement that should be mentioned. Although not as integral as the previous four agreements, there was a certain Amended and Restated Agreement of Limited Partnership of Acis Capital Management, L.P., dated to be effective as of January 1, 2011 (the “LPA”), entered into among the general partner and limited partners of Acis LP. Reorganized Acis has argued in the Adversary Proceeding that this LPA limited in some respects the compensation that could be paid to Highland under the Sub-Advisory Agreement and the Shared Services Agreement.

**B. Next, the 35 Counts Asserted Against Highland in this Adversary Proceeding.**

The Adversary Proceeding, distilled to its essence—and as currently framed—is all about certain activities of Highland and some of its affiliates and actors who controlled it, which activities were allegedly aimed at *denuding Acis LP of all of its value*, at a time when the former portfolio manager for Acis LP was on the verge of obtaining a very large judgment claim against Acis LP. Specifically, these activities of Highland began soon after: (a) it terminated former Acis CLO manager Joshua Terry (“Terry”) in June 2016; (b) it began litigating with him (which litigation was sent to arbitration) in September 2016; and (c) Terry obtained an approximately \$8 million arbitration award against Acis LP in October 2017, which was confirmed by a judgment in December 2017. The activities and counts revolve around: (a) Highland’s alleged overcharging of Acis LP by more than \$7 million for fees/expenses under the Sub-Advisory and Shared Services Agreement, as limited by the LPA (Counts 1-4); (b) alleged fraudulent transfers

of value out of Acis LP, by virtue of various amendments and modifications of the Sub-Advisory and Shared Services Agreements (Counts 5-8); (c) an alleged fraudulent transfer as to the Equity/ALF PMA (Counts 9-12); (d) an alleged fraudulent transfer pertaining to Acis LP's conveyance away of its so-called ALF Equity (Counts 13-16); (e) an alleged fraudulent transfer of a \$9.5 million note receivable Acis LP held (Counts 17-20); (f) various other fraudulent transfers (Counts 21-24); (g) preferences (Count 25); (h) assertion of a section 550 recovery remedy for the aforementioned avoidance actions (Count 26); and (i) requests for punitive damages, an alter ego/veil piercing remedy, and attorneys' fees (Counts 33-35). There are also some counts complaining of postpetition state law torts and breaches of contract (Counts 27-32).

As mentioned earlier, Highland's Arbitration Motion only requests the court defer to arbitration Counts 1-8—that is the counts relating to: (a) Highland's alleged overcharging of Acis LP by more than \$7 million for fees/expenses under the Sub-Advisory and Shared Services Agreement, as perhaps limited by the LPA (Counts 1-4); and (b) the alleged fraudulent transfers of value out of Acis LP, by virtue of various amendments and modifications of the Sub-Advisory and Shared Services Agreements (Counts 5-8). Highland argues that, *since all of these counts pertain to the Sub-Advisory Agreement and Shared Services Agreement* between Acis LP and Highland, the arbitration clauses in those agreements dictate that the counts be carved out from this Adversary Proceeding and sent to binding arbitration. Highland acknowledges that these two agreements were amended and restated numerous times, and that the last time they were amended (March 17, 2017) the arbitration clauses were eliminated, but Highland argues that, since all of the activity complained of in Counts 1-8 occurred *prior* to March 17, 2017, *the older iterations of the Sub-Advisory and Shared Services Agreements, with arbitration clauses, govern*. Highland zeroes in on the fact that Counts 1-4, at their essence, are assertions that the



fees for services charged by Highland in the Sub-Advisory and Shared Services Agreements were excessive for the years 2013, 2014, 2015, and through May 2016 (all before the March 17, 2017 iteration of the agreements). And Counts 5-8, while articulated as fraudulent transfer claims, pertain to the modifications made to the Sub-Advisory and Shared Services Agreements at various stages up to the March 17, 2017 versions.

The Reorganized Debtors have argued that it is quite clear that the last iterations of the Sub-Advisory and Shared Services Agreements intended to supersede in every way the prior versions. That includes the provisions directing arbitration. And, they argue, it does not matter *when* the causes of action occurred/accrued or not. What matters is that the parties agreed at some point that their disputes would not be sent to arbitration and this was the last governing document.

**C. The Relevant Language in the Sub-Advisory and Shared Services Agreements Pertaining to (i) Arbitration and (ii) Superseding of Prior Agreements.**

As mentioned earlier, there was an arbitration clause at Section 16(f) of the Sub-Advisory Agreement until the last March 17, 2017 version. The clause read as follows:

[I]n the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act. . . .<sup>23</sup>

In the Shared Services Agreement, an arbitration clause appeared at Section 9.14, as follows:

Notwithstanding anything contained in this Agreement or the Annexes hereto to the contrary, in the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act. . . .<sup>24</sup>

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<sup>23</sup> Exh. 1 of Arbitration Motion, at 7-8.

<sup>24</sup> Exh. 6 of Arbitration Motion, at 9-10.

As earlier mentioned, these two agreements were later amended and restated several times. The arbitration provisions remained identical until they were completely eliminated in March 2017. The Reorganized Debtor argues that this is a short analysis: there was no longer an operative arbitration provision as of March 17, 2017.

In the March 17, 2017 version of the Shared Services Agreement, the parties agreed “that the courts of the State of Texas and the United States District Court located in the Northern District of Texas in Dallas are to have exclusive jurisdiction to settle any disputes (whether contractual or noncontractual) which may arise out of or in connection with this Agreement and that accordingly any action arising out of or in connection therewith (together referred to as ‘Proceedings’) may be brought in such courts.”<sup>25</sup>

The same type language appeared in the March 17, 2017 version of the Sub-Advisory Agreement: “The parties unconditionally and irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.”<sup>26</sup>

More generally, the March 17, 2017 versions of the agreements each provided that they “amended, restated and replaced the existing agreements *in [their] entirety*.”<sup>27</sup> The March 17, 2017 agreements also each provided that they “supersede[d] all prior agreements and undertakings, both written and oral, between the parties with respect to such subject matter.”<sup>28</sup>

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<sup>25</sup> Exh. 10 of Arbitration Motion, § 8.04(b).

<sup>26</sup> Exh. 5 of Arbitration Motion, § 13.

<sup>27</sup> Exhs. 5 and 10 of Arbitration Motion, each at p. 1 (emphasis added).

<sup>28</sup> Exh. 5 of Arbitration Motion, ¶ 20; Exh.10 of Arbitration Motion, ¶ 8.14.

In summary, the Reorganized Debtors argue that, under Texas common law, basic principles of contract interpretation, and the plain language of the March 17, 2017 version of the agreements, there is no agreement to arbitrate. “A contract's plain language controls.”<sup>29</sup> Because the prior versions of the agreements were “amended, restated and replaced in [their] entirety” with the March 17, 2017 agreements—which not only omit an arbitration provision, but also expressly provide for jurisdiction and venue in Texas state or federal courts—the Reorganized Debtors argue that there exists no valid agreement to arbitrate between Highland and Acis LP. The court's inquiry can and should end there. But, if the court concludes the arbitration clauses are still applicable, the Reorganized Debtors argue that the bankruptcy court has discretion *not* to compel arbitration when (a) bankruptcy core matters are involved, and (b) arbitration would conflict with the purposes of the Bankruptcy Code. Therefore, this is further reason why the Arbitration Motion should be denied.

### **III. Legal Analysis.**

#### **A. The Federal Arbitration Act and Arbitration Clauses Generally.**

The FAA provides that arbitration agreements are always “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>30</sup> Thus, the FAA reflects a liberal federal policy favoring arbitration, and requires arbitration agreements to be rigorously enforced according to their terms.<sup>31</sup> The FAA “expresses a strong national policy favoring arbitration of disputes, and all doubts concerning the

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<sup>29</sup> *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017).

<sup>30</sup> 9 U.S.C. § 2.

<sup>31</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted).

arbitrability of claims should be resolved in favor of arbitration.”<sup>32</sup> “There is a strong presumption in favor of arbitration and the party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity.”<sup>33</sup>

When considering a motion to compel arbitration, the Fifth Circuit has held there are two threshold questions: (1) whether an arbitration agreement is valid; and (2) whether the dispute falls within the scope of the agreement.<sup>34</sup> To evaluate the enforceability of an arbitration agreement, courts apply the contract law of the state that governs the agreement,<sup>35</sup> whereas the scope of the agreement is a matter of federal substantive law.<sup>36</sup>

**B. Is There a Valid Agreement to Arbitrate that Applies Here and is Still Enforceable?**<sup>37</sup>

With respect to the first element—whether a valid agreement to arbitrate exists—federal courts “apply ordinary state-law principles that govern the formation of contracts.”<sup>38</sup> Here, the choice of law provisions of the Highland-Acis Agreements state: “This Agreement shall be

<sup>32</sup> *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

<sup>33</sup> *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004).

<sup>34</sup> *See Agere Sys. Inc. v. Samsung Elecs. Co. Ltd.*, 560 F.3d 337, 339 (5th Cir. 2009).

<sup>35</sup> *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004) (citation omitted).

<sup>36</sup> *Graves v. BP Am., Inc.*, 568 F.3d 221, 222-23 (5th Cir. 2009); *see also Neal v. Hardee’s Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) (under federal law, courts “resolve doubts concerning the scope of coverage of an arbitration clause in a contract in favor of arbitration,” and arbitration should not be denied “unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue”).

<sup>37</sup> The court is assuming, without analysis, that the Chapter 11 Trustee (and the Reorganized Debtors) are bound by the arbitration clauses, if Acis LP affirmatively agreed to be bound by them and would still be bound by them outside of bankruptcy. Case law has stated that a bankruptcy trustee “stands in the shoes of the debtor for the purposes of [an] arbitration clause” and “the trustee-plaintiff is bound by the clause to the same extent as would the debtor.” *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1153 (3d Cir. 1989); *see also Janvey v. Alguire*, No. 3:09-CV-0724-N, 2014 WL 12654910 at \*6 (N.D. Tex. July 30, 2014) (quoting *Hays*).

<sup>38</sup> *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Wash. Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004).

governed by the laws of Texas. . . .”<sup>39</sup> “Under the Texas rules, in those contract cases in which the parties have agreed to an enforceable choice of law clause, the law of the chosen state must be applied.”<sup>40</sup> Accordingly, Texas law governs whether the parties are subject to an enforceable agreement to arbitrate.

Here, obviously the parties entered into an agreement to arbitrate in both the Sub-Advisory Agreement (Section 16(f))<sup>41</sup> and the Shared Services Agreement Section 9.14.<sup>42</sup> And, it would seem to be beyond peradventure that this was, at one time, enforceable between the parties, with regard to any disputes that arose regarding the agreements. The tricky conundrum here is that those arbitration provisions were deleted in the most recent iterations of the agreements—that is, the March 17, 2017 versions of the agreements. Highland argues that, since Counts 1-8 involve alleged overcharges under the agreements in years 2013-2016, and alleged fraudulent transfers up to March 17, 2017 (such fraudulent transfers allegedly occurring by virtue of modifications to the agreements that were made up to March 17, 2017), the pre-March 17, 2017 version of the agreements must be applied with respect to these Counts 1-8 and, thus, the arbitration provisions apply. In other words, what matters is when causes of action *accrue* not when they are ultimately asserted.

The parties have cited a handful of cases to the court, but the one that the court believes is most analogous is the *Coffman v. Provost \* Umphrey Law Firm, L.L.P.* case.<sup>43</sup> In the *Coffman* case,

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<sup>39</sup> See, e.g., Exh. 1 to Arbitration Motion, § 16(a); Exh. 5 to Arbitration Motion, § 13; Exh. 6 to Arbitration Motion, § 9.05; Exh. 10 to Arbitration Motion, § 8.04(a).

<sup>40</sup> *Resolution Trust Corp. v. Northpark Joint Venture*, 958 F.2d 1313, 1318 (5th Cir. 1992) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 678 (Tex. 1990)).

<sup>41</sup> Exhs. 1-4 of the Arbitration Motion.

<sup>42</sup> Exhs. 6-9 of the Arbitration Motion.

<sup>43</sup> *Coffman v. Provost \* Umphrey Law Firm, L.L.P.*, 161 F. Supp. 2d 720 (E.D. Tex. 2001).

the plaintiff was a former non-equity partner of a law firm and brought a lawsuit against the firm and its equity partners, alleging *inter alia*, breach of contract, breach of fiduciary duty, violations of Title VII and/or the Texas Commission on Human Rights Act (“TCHRA”), and violations of the Equal Pay Act. The law firm filed a motion to compel arbitration with regard to all of these claims. The law firm’s motion to compel was based upon various partnership agreements which governed the law firm. The original partnership agreement was first effective on August 26, 1986, and the plaintiff did not sign that agreement. Subsequent to that time, however, the original partnership agreement was amended and restated on several occasions. The plaintiff admitted that she signed four partnership agreement documents: (1) a Restated Partnership Agreement of Provost \* Umphrey Law Firm, L.L.P.—Effective January 1, 1994 (“1994 Partnership Agreement”); (2) a Restated Partnership Agreement of Provost \* Umphrey Law Firm, L.L.P.—Effective January 1, 1996 (“1996 Partnership Agreement”); (3) an Amendment No. 1 to the Restated Partnership Agreement of Provost \* Umphrey Law Firm, L.L.P., Dated January 1, 1996—Effective January 1, 1997 (“1996 Amendment No. 1”); and (4) a Partnership Agreement of Provost \* Umphrey Law Firm, L.L.P., As Restated —Effective January 1, 1998 (“1998 Partnership Agreement”). The earlier two agreements—*i.e.*, the 1994 and 1996 Partnership Agreements—did **not** contain an arbitration clause. The 1996 Amendment No. 1 and the 1998 Partnership Agreement, on the other hand, both contained an identical arbitration clause as follows:

Binding Arbitration. The equity partners and non-equity partners shall make a good faith effort to settle any dispute or claim arising under this partnership agreement. If the equity or non-equity partners fail to resolve a dispute or claim, such equity or non-equity partner shall submit the dispute or claim to binding arbitration under the rules of the American Arbitration Association then in effect. Judgment on arbitration awards may be entered by any court of competent jurisdiction.<sup>44</sup>

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<sup>44</sup> *Id.* at 723.

Additionally, all four of the above-referenced partnership agreements contained an integration clause stating that “[t]his agreement contains the entire agreement . . . and all prior agreements . . . are terminated.”<sup>45</sup>

Interestingly, the plaintiff *conceded* that claims she asserted involving the 1996 Amendment No. 1 and the 1998 Partnership Agreement were required to go to arbitration (such claims requested determinations regarding: (1) the enforceability of the 1996 Amendment No. 1 and the 1998 Partnership Agreement; (2) breach of the 1996 Amendment No. 1 and the 1998 Partnership Agreement; (3) repudiation; and (4) breach of the duty of good faith and fair dealing). However, the plaintiff disagreed that her remaining claims were also required to go to arbitration and those were: (a) breach of the 1994 and 1996 Partnership Agreements; (b) breach of fiduciary duty; (c) violations of Title VII and/or TCHRA; and (d) violations of the Equal Pay Act. The district court granted in part and denied in part the motion to compel arbitration, holding that: (1) the plaintiff’s contract claims arising under *earlier* partnership agreements, which *did not* contain arbitration clauses, were *not arbitrable*; (2) a common law breach of fiduciary duty claim was arbitrable under the agreements (it appears that these claims arose after the 1996 Amendment No. 1 and 1998 Partnership Agreement); and (3) statutory sex-based discrimination claims were not arbitrable under the agreements.<sup>46</sup>

Relevant to the case at bar, the *Coffman* court noted, first, that the conduct underlying the alleged breaches of the 1994 and 1996 contracts occurred at a time when no arbitration clause was in effect. The plaintiff’s complaint specifically alleged that, during the time the four

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 733.



agreements were in effect, the law firm failed to properly calculate Plaintiff's compensation, failed to promote her, and deprived her of benefits from a tobacco case. The court noted that, if the law firm did participate in such conduct during the time that the 1994 and 1996 Partnership Agreements were in effect, such conduct could not have "arisen under" the 1996 Amendment No. 1 or the 1998 Partnership Agreement ***because those agreements did not even exist at that time***. But, to the extent that the conduct Plaintiff complained of occurred when the 1996 Amendment No. 1 and the 1998 Partnership Agreement were in effect, her claims would be subject to arbitration.<sup>47</sup>

The court further noted that the arbitration clause should not be interpreted as covering the plaintiff's claims for breach of the 1994 and 1996 Partnership Agreements because the plain grammatical language of the arbitration clause gave no indication that it would apply retroactively. "To interpret the arbitration clause to apply retroactively would cause Plaintiff to forego her vested right to litigate an accrued claim."<sup>48</sup>

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<sup>47</sup> *Id.* at 726 (citing *Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 372 (6th Cir. 1999) (arbitration provision in 1994 shipping agreement did not cover conduct that occurred under prior shipping agreements); *Necchi S.p.A. v. Necchi Sewing Mach. Sales Corp.*, 348 F.2d 693, 698 (2d Cir. 1965) (claim based on conduct which had arisen "prior to" effective date of arbitration clause was not within scope of arbitration agreement); *Hendrick v. Brown & Root, Inc.*, 50 F. Supp. 2d 527, 533-34 (E.D.Va. 1999) (arbitration clause in fourth contract did not cover conduct that occurred when third contract was in effect); *Connett v. Justus Enters. of Kansas, Inc.*, Civ. A. No. 87-1739-T, 1989 WL 47071, at \*2 (D. Kan. March 21, 1989) (arbitration clause did not apply when alleged fraudulent conduct occurred before plaintiff executed contract with arbitration clause); *George Wash. Univ. v. Scott*, 711 A.2d 1257, 1260-61 (D.C. Ct. App. 1998) (conduct that occurred before arbitration clause took effect was not arbitrable).

<sup>48</sup> *Coffman*, 161 F. Supp. 2d at 726-27 (citing *Sec. Watch*, 176 F.3d at 372-73 (arbitration clause did not reach disputes arising under earlier agreements because it is "nonsensical to suggest that [the plaintiff] would abandon its established right to litigate disputes arising under the [prior] contracts"); *Choice Sec. Sys. v. AT&T Corp.*, No. 97-1774, 1998 WL 153254, at \*1 (1st Cir. Feb.25, 1998) (arbitration clause in 1994 contracts did not apply to pre-1994 contracts when the language of the arbitration clause did not indicate "that the parties ever contemplated so radical a retroactive renegotiation of their earlier agreements"); *Hendrick*, 50 F. Supp. 2d at 535 (arbitration clause was not retroactive when the text of the clause expressed no language providing that it "reache[d] back in time to require an employee to arbitrate a claim which had accrued before the contract was signed or the [arbitration clause] took effect"); *Connett*, 1989 WL 47071, at \*2 (arbitration clause did not apply retroactively when it did not specify that it applied to past conduct); *Kenworth of Dothan, Inc. v. Bruner-Wells Trucking, Inc.*, 745 So.2d 271, 275-76 (Ala. 1999) (arbitration clause was not retroactive when language of the clause did not so state); *George Wash. Univ.*, 711 A.2d at 1261 (arbitration clause was not retroactive when "the arbitration clause itself contained no indication whatsoever that its terms would apply . . . before [its effective date]").



Bottom line, the court in *Coffman* seemed to focus on *when each cause of action accrued* and looked to the *agreement that governed at such time*. This court agrees with that reasoning and sees no reason why the result should be different in the case at bar, simply because the arbitration clauses in the case at bar were in *earlier* versions of the Sub-Advisory and Shared Services Agreements as opposed to being in the *later* versions of those agreements (in other words, the opposite sequence as in the *Coffman* case).

The Reorganized Debtors have cited a couple of cases that they believe justify a determination that there is no binding arbitration clause in the case at bar. One is the case of *Goss-Reid & Assocs. Inc. v. Tekniko Licensing Corp.*<sup>49</sup> This case involved a motion to compel arbitration that was denied (which denial was affirmed by the Fifth Circuit). Like the case at bar, it involved a situation where there had been a succession of agreements, with earlier agreements containing arbitration provisions and the last agreement containing no arbitration clause. Specifically, in the *Goss-Reid* case, there were three agreements that were relevant. First, a **Franchise Agreement** between a franchisor named Transformational Technologies, Inc. (“TTI”) and a party named Rittenhaus-Tate Organization (“RTO”). RTO was a business owned by Tracy Goss and Sheila Reid. The Franchise Agreement, among other things, provided that RTO’s owners Tracy Goss and Sheila Reid would be “licensed franchisees of TTI” and would have use of certain of TTI’s intellectual property. During the term of the Franchise Agreement, Tracy Goss and Sheila Reid developed certain consulting services technology they called “The Winning Strategy” and it apparently was built off of TTI’s intellectual property. This first agreement contained a mandatory arbitration provision. Second, there was a **License**

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<sup>49</sup> *Goss-Reid & Assocs. Inc. v. Tekniko Licensing Corp.*, 54 Fed. Appx. 405 (5th Cir. 2002) (per curium opinion which is designated as having no precedential effect).

**Agreement** between the apparent successor-in-interest of TTI called Tekniko, Inc., on the one hand, and Tracy Goss, Sheila Reid and Goss-Reid & Associates, Inc. (collectively, “Goss/Reid”), on the other, pursuant to which Goss/Reid obtained a “a non-exclusive license to use the same intellectual property covered by the Franchise Agreement.” This second agreement also contained a mandatory arbitration agreement. Third, there was a **Transfer Agreement** that appears to have been entered into by the same parties as the second agreement (Tekniko, Inc. and Goss/Reid). The Transfer Agreement “permanently transferred [to Goss/Reid] the non-exclusive right to use the intellectual property that was the subject of the prior agreements in exchange for a percentage of [Goss & Reid’s] adjusted gross profits for that year.” There was no arbitration provision in this third agreement and the agreement did not adopt or refer to the arbitration provisions contained in the earlier agreements. The third agreement stated that it constituted “an amendment to the License Agreement . . . between you and this company (‘TEKNIKO’), supersedes all prior agreements between you and TEKNIKO and, except as provided below, will terminate your rights and those of TEKNIKO under the License Agreement.”

At some subsequent time, Goss/Reid filed a lawsuit alleging improper use of “The Winning Strategy” by the entities Tekniko Licensing Corporation and Landmark Education Company. These Defendants (hereafter so called) asserted ownership themselves of “The Winning Strategy” based on the Franchise Agreement. The Defendants—citing to the arbitration clauses in both the Franchise Agreement and the License Agreement—filed a motion to compel arbitration, which was denied at the district court level and also at the Fifth Circuit. The district court determined that New York law applied (*i.e.*, the Transfer Agreement was governed by New York law and apparently the parties agreed that New York law applied), and that the Transfer Agreement constituted a novation and extinguished the arbitration provisions of the previous

agreements. On appeal, the Fifth Circuit stated that the issue before it was “whether the arbitration provisions of the Franchise and License Agreements were superseded by the Transfer Agreement. Thus, the question before us is one of contractual interpretation.”<sup>50</sup>

The Fifth Circuit stated certain principles that apply under both New York and Texas law. Among other principles, the Fifth Circuit noted that courts construing contracts “should strive to give effect to the intentions of the parties, as expressed in the terms of the contract.”<sup>51</sup> The Transfer Agreement stated that “it supersedes all prior agreements” between Goss/Reid and the predecessor-in-interest of one of the Defendants, Tekniko Licensing Corporation.<sup>52</sup> “This type of agreement clearly constitutes a novation under New York law.”<sup>53</sup> The court also noted that it was not appropriate to consider any extrinsic or parol evidence, since there was no ambiguity in the Transfer Agreement. The court further stated that “[t]he only potential ambiguity raised by the Defendants is that the Transfer Agreement refers to itself as an ‘amendment to the License Agreement.’ Read as a whole, however, the Transfer Agreement plainly manifests an intention to supersede all prior agreements between the parties and, except as specifically provided, to terminate all rights and obligations under the License Agreement.”<sup>54</sup>

The other case that the Reorganized Debtors have significantly relied upon to justify a determination that there is no binding arbitration clause in the case at bar is *Valero Energy Corp. v. Teco Pipeline Co.*<sup>55</sup> In *Valero*, there had been numerous agreements entered into over time

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<sup>50</sup> *Id.* at \*1.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (citing various New York state court cases).

<sup>54</sup> *Id.* at \*2.

<sup>55</sup> *Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

amongst the litigating parties, all of which involved gas pipelines and transportation rights, and those various agreements were not amendments or restatements of one initial agreement. Rather, there was an Operating Agreement, there were documents that were alleged to create a joint venture or partnership, a Purchase Agreement, an Ownership Agreement, a Transportation Agreement, and a couple of Settlement Agreements entered into later when various disputes arose. One of the key agreements, the so-called Operating Agreement, contained an arbitration clause. When party Teco Pipeline sued party Valero and other related parties, Valero moved to compel arbitration, arguing that the litigation was subject to the arbitration clause in the Operating Agreement. The trial court denied Valero's motion, but the court of appeals reversed.

Teco had argued that the claims it was asserting were not based on the Operating Agreement that contained the arbitration clause but, even if they were, a later Settlement Agreement essentially redefined the parties' relationship—essentially superseding the parties' relationship that had been set forth in the numerous prior agreements—and it did not have an arbitration clause. Rather the Settlement Agreement stated that:

Each party irrevocably consents and agrees that any legal action, suit or proceeding against any of them with respect to their obligations, liabilities, or any other matter under or arising out of or in connection with this Agreement may be brought in the United States District Court for the Western District of Texas, San Antonio Division, or in the courts of the State of Texas, and hereby irrevocably accepts and submits to the jurisdiction of each of the aforesaid court in personam, generally and unconditionally with respect to any such action, suit or proceeding for itself and in respect of its properties, assets and revenues.<sup>56</sup>

Teco asserted that the quoted clause provided for the procedure to be used in future disputes, *i.e.*, that the parties would go through judicial channels, not arbitration. Teco also asserted that the intent to revoke the arbitration clause was signified by a typical merger clause contained in the

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<sup>56</sup> *Id.* at 587.

Settlement Agreement. The appeals court disagreed with Teco's argument and determined arbitration was required. First, the court determined that the provision regarding litigation applied only to disputes arising under the Settlement Agreement not the previously executed Operating Agreement, Purchase Agreement, Ownership Agreement, or Transportation Agreements. There was nothing to indicate that all the terms of those previous agreements had been superseded by the Settlement Agreement. In fact, it appeared that only select terms of the earlier agreements were being modified. Significantly, the Settlement Agreement referred to an "Amendment No. 1" to the Operating Agreement being attached as an Exhibit D to the Settlement Agreement—suggesting that it remained in intact (except for the amendment attached). Moreover, there was a post-Settlement Agreement letter submitted into evidence stating that the prior Operating Agreement and arbitration provision were still in effect. The court addressed many other arguments made by Teco and, in the end, found nothing had superseded or otherwise revoked the prior arbitration clause.

This bankruptcy court does not consider the *Valero* or *Goss-Reid* cases to be dispositive of the situation in the case at bar. Those cases clearly dealt with a myriad of agreements—for example, in *Valero*, one key agreement had an arbitration clause, and an allegedly superseding Settlement Agreement (with no arbitration clause) was determined not to have been intended to supersede or replace the agreement with the arbitration clause. In *Goss-Reid*, there were also a myriad of agreements (*i.e.*, a franchise agreement, a license agreement and then a transfer agreement), and the last one containing no arbitration clause was held to have been a novation of the prior agreements. In *Valero* and *Goss-Reid*, the various agreements were not amendments or restatements of one initial agreement. The case at bar is more analogous to the *Coffman* case (involving amendments and restatements of an initial agreement) and the logic of that holding

seems sound to apply here—especially given the fact that there is nothing in the March 17, 2017 version of the agreements that suggests that the agreement to submit disputes to litigation in Texas and the deletion of the arbitration clauses should be applied retroactively. The court believes it should look at when a cause of action accrued and determine if there was a binding arbitration clause between the parties at that time in the governing version of the agreement. Thus, the court determines that there were valid arbitration agreements that applied to all disputes arising out of the Sub-Advisory Agreement and Shared Services Agreement—to the extent that those disputes involved conduct prior to March 17, 2017. Since Counts 1-8 involve conduct prior to March 17, 2017, Counts 1-8 fall within the scope of the arbitration agreements in the Sub-Advisory Agreement and Shared Series Agreement.

**C. But Wait, this is Bankruptcy and Core Matters and a Proof of Claim Objection are Involved.**

The analysis does not end here. Yes, there is an otherwise valid, binding arbitration clause that was contained in each of the Sub-Advisory and Shared Services Agreements (prior to March 17, 2017). And, yes, Counts 1-8 involve conduct and disputes arising under these pre-March 17, 2017 agreements. But what about the fact that these disputes arise in an adversary proceeding that involves mostly, if not entirely, “core” matters (*e.g.*, Counts 5-25 are all fraudulent transfers or preference claims under Section 544,<sup>57</sup> 547,<sup>58</sup> or 548;<sup>59</sup> Count 2 is a Section 542 turnover request;<sup>60</sup> Count 26 is a request for Section 550 recovery<sup>61</sup>)? And what

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<sup>57</sup> See 28 U.S.C. § 157(b)(2)(H).

<sup>58</sup> See 28 U.S.C. § 157(b)(2)(F).

<sup>59</sup> See 28 U.S.C. § 157(b)(2)(H).

<sup>60</sup> See 28 U.S.C. § 157(b)(2)(E).

<sup>61</sup> See 28 U.S.C. § 157(b)(2)(F) & (H).

about the fact that Highland (the counter-party to the Sub-Advisory and Shared Services Agreement who has asked for enforcement of the arbitration clauses in those agreements) has filed proofs of claim?<sup>62</sup> And what about the fact that Counts 1-8 (as with every count in the Adversary Proceeding) are all urged to be *offsets* to Highland's proofs of claim?<sup>63</sup> Highland's proofs of claim are based on the post-March 17, 2017 versions of the Sub-Advisory and Shared Services Agreements (*i.e.*, the versions that have no arbitration clauses). Highland has not argued that its proofs of claim are subject to arbitration (likely because they are governed by the post-March 17, 2017 versions of the Sub-Advisory and Shared Services Agreements). But, again, Highland argues that Counts 1-8 must be sent to arbitration, and the Reorganized Debtors argue that each of these counts present potential offsets to Highlands' proofs of claim. As a reminder, these counts are:

- COUNT 1:** Declaratory Judgment of Ultra Vires Acts by Acis LP in Violation of the LPA (Highland allegedly overcharged expenses by \$7M+ (*i.e.*, excessive fees) under the Sub-Advisory and Shared Services Agreements).
- COUNT 2:** Turnover of Property of the Estate Under § 542 for Unauthorized Overpayments (turnover the \$7M+ overcharged).
- COUNT 3:** Money Had and Received for Overcharges and Unauthorized Overpayments (again, seeking redress for the \$7M+ overcharged—implicating the Sub-Advisory Agreement and Shared Services Agreement).
- COUNT 4:** Conversion for Unauthorized Overpayments (again, seeking redress for the \$7M+ overcharged implicating the Sub-Advisory Agreement and Shared Services Agreement).
- COUNT 5:** Actual Fraudulent Transfer under § 548 related to the Sub-Advisory Agreement (modifications to the Sub-Advisory Agreement in subsequent iterations were allegedly fraudulent transfer, as were payments thereunder).

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<sup>62</sup> See 28 U.S.C. § 157(b)(2)(B).

<sup>63</sup> See 28 U.S.C. § 157(b)(2)(C).



- COUNT 6:** Actual Fraudulent Transfer Under TUFTA, § 24.005(a)(1) related to the Sub-Advisory Agreement (same theory as Count 5, asserted through section 544 of the Bankruptcy Code).
- COUNT 7:** Constructive Fraudulent Transfer Under § 548(a)(1)(B) related to the Sub-Advisory Agreement (same facts as Count 5 only constructive not actual fraud).
- COUNT 8:** Constructive Fraudulent Transfer Under TUFTA §§ 24.005(a)(2) and 24.006(a) related to the Sub-Advisory Agreement (same facts as Count 5, only constructive fraud under TUFTA, and asserted through section 544 of the Bankruptcy Code).

Thus, to recap, *five of the eight counts that Highland wants arbitrated* (Counts 2, and 5-8) clearly involve statutory core matters.<sup>64</sup> Moreover, *all* of the counts in the Adversary Proceeding are asserted *defensively* to two proofs of claim—meaning *all eight counts that Highland wants arbitrated* (even Counts 1, 3, and 4) have transformed into statutory core matters.<sup>65</sup> Does this matter? This court believes yes.

The Fifth Circuit has shed some light on this topic in the cases of *In re Gandy* and *In re National Gypsum*.<sup>66</sup> In those cases, the Fifth Circuit instructed that a bankruptcy court may decline to enforce arbitration clauses when it finds: (a) the underlying nature of the proceeding

<sup>64</sup> See 28 U.S.C. § 157(b)(2)(E), (F), and (H).

<sup>65</sup> See 28 U.S.C. § 157(b)(2)(C). This court realizes that, from a *Stern v. Marshall* perspective, 131 S. Ct. 2594 (2011), being a *statutory* “core” matter does not necessarily mean a bankruptcy court has Constitutional authority to issue final orders or judgments in the matter. However, even if this *Stern* pronouncement has any relevance, when evaluating an arbitration clause/right, the court perceives that the various counterclaims here (*i.e.*, all 35 counts) are likely *inexplicably intertwined* with the Highland proofs of claim, such that the bankruptcy court would likely have Constitutional authority to adjudicate them. While Highland’s proofs of claim merely seek payment for services under the post-March 17, 2017 versions of the agreements—which is *after* the time frame that Counts 1-8 implicate—it is not so simple as dividing claims and counterclaims into discreet time periods. For one thing, the Reorganized Debtors argue that modifications to the Sub-Advisory and Shared Services Agreements that increased fees that Highland could charge (and that Highland is now seeking in its proofs of claim) were tantamount to fraudulent transfers. Thus, how does one evaluate the proofs of claim separately from this argument? Additionally, Highland *has asserted unliquidated indemnification claims* in its proofs of claim that presumably reach back to earlier iterations of the Sub-Advisory and Shared Services Agreement (meaning that claims ultimately awarded to the Reorganized Debtors under earlier versions of the agreements might result in indemnification claims being asserted back against them by Highland relating to those very claims). The point being that all of Highland’s assertions in its proofs of claim seem inextricably intertwined with all the Counts in the Adversary Proceeding.

<sup>66</sup> *Gandy v. Gandy (In re Gandy)*, 299 F.3d 489 (5th Cir. 2002); *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056 (5th Cir. 1997).



derives from the provisions of the Bankruptcy Code; and (b) that enforcement of the arbitration provision would conflict with the purposes/goals of the Bankruptcy Code.<sup>67</sup> Some purposes/goals of the Code that might support a denial of arbitration, include: (1) the equitable and expeditious distribution of assets of the Debtor's estate; (2) centralized resolution of pure bankruptcy issues; (3) protection of creditors and reorganizing debtors from piecemeal litigation, and (4) the undisputed power of a bankruptcy court to enforce its orders.<sup>68</sup>

The *In re Gandy* opinion from the Fifth Circuit is worthy of discussion here. In *Gandy*, an individual Chapter 11 debtor had first, prepetition, filed a state court lawsuit against various business partners, asserting causes of action against them for making transfers out of a partnership affecting her ownership interests, and the causes of action included breach of contract, negligence, breach of fiduciary duty, fraud and constructive trust. There was an arbitration clause in the applicable partnership agreement and the state court granted a motion to compel arbitration. Then, the debtor filed a Chapter 11 case and removed the state court lawsuit to the bankruptcy court and filed new claims under sections 544, 548, 550, civil "RICO," and alter ego in a separate adversary proceeding, and requested substantive consolidation. The bankruptcy court granted consolidation of the two actions and then the defendants filed a motion to compel arbitration. The bankruptcy court denied the motion, after finding that the debtor was essentially seeking avoidance of fraudulent transfers. The Fifth Circuit affirmed the bankruptcy court's refusal to enforce an arbitration clause contained in the underlying partnership agreement. The court agreed with the bankruptcy court that the complaint essentially—more than anything else—sought avoidance of fraudulent transfers, and the court not only determined

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<sup>67</sup> *Id.* at 1069.

<sup>68</sup> *Id.*

that such rights derived from the Bankruptcy Code (fully acknowledging the fact that there were state law tort claims and breach of contract also asserted) but also—in looking at whether enforcing the arbitration clause would conflict with the purposes of the Bankruptcy Code—noted that one central purpose of the Bankruptcy Code is the expeditious and equitable distribution of the assets of a debtor’s estate. The court thought the avoidance actions predominated over the “peripheral” contract and tort claims and, in such a circumstance, “the importance of the federal bankruptcy forum provided by the Code is at its zenith.”<sup>69</sup> The court stated that “[s]ome of the purposes of the Code we mentioned in *National Gypsum*<sup>70</sup> as potentially conflicting with the Arbitration Act include the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of the bankruptcy court to enforce its own orders.”<sup>71</sup>

This court believes, like the court in *Gandy*, that this Adversary Proceeding—more than anything else—seeks avoidance of fraudulent transfers. Such avoidance theories derive from the Bankruptcy Code. Sections 542, 547, 548 and 550 of the Bankruptcy Code are front and center, as are the “strong arm” powers of section 544(a). Enforcing the arbitration clause here would conflict with the purposes of the Bankruptcy Code—one of the central purposes of which is the

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<sup>69</sup> *Gandy*, 299 F.3d at 497.

<sup>70</sup> In the *National Gypsum* case, an asbestos litigation trust created under a confirmed plan filed a post-confirmation adversary proceeding against debtor’s liability insurer, seeking a declaratory judgment that the plan had discharged its obligations to the insurance company. The insurance company, in response to the litigation, sought to exercise its rights to seek arbitration under a certain agreement. The Fifth Circuit, in affirming the lower courts’ refusal to compel arbitration, stated that, “We believe that nonenforcement of an otherwise applicable arbitration provision turns on the underlying nature of the proceeding, *i.e.*, whether the proceeding derives exclusively from the provisions of the Bankruptcy Code and, if so, whether arbitration of the proceeding would conflict with the purposes of the Code.” *Nat’l Gypsum Co.*, 118 F.3d at 1067. Because the debtor sought to bar the insurance company’s actions either by invoking section 524(a)’s discharge injunction or by invoking the terms of a confirmed plan, the proceeding derived entirely from the provisions of the Bankruptcy Code, and, hence, the *National Gypsum* court would not send the dispute to arbitration.

<sup>71</sup> *Gandy*, 299 F.3d at 500.

expeditious and equitable distribution of the assets of a debtor's estate. The avoidance actions in this Adversary Proceeding predominate over all other counts and, in such a circumstance, "the importance of the federal bankruptcy forum provided by the Code is at its zenith." Arbitrating Counts 1-8 would seriously jeopardize the Adversary Proceeding because they are an integral part of determining Highland's proofs of claim and the other core counts in the Adversary Proceeding. The bankruptcy court's quintessential duties are to adjudicate proofs of claim and to provide a central forum for litigation, whenever feasible and jurisdictionally sound. Indeed, in *Gandy*, the Fifth Circuit noted that when a proof of claim is filed, one of the "peculiar powers" of the bankruptcy court has been invoked and the nature of estate claims becomes "different from [their] nature . . . following the filing of a proof of claim."<sup>72</sup>

In summary, this court believes it has discretion under established Fifth Circuit authority to decline to order arbitration here.<sup>73</sup> It is, therefore,

**ORDERED** that the Arbitration Motion is **DENIED**.

**#### END OF MEMORANDUM OPINION AND ORDER####**

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<sup>72</sup> *Id.* at 499 (citing *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987)).

<sup>73</sup> See also *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382, 389-90 (2d Cir. 2018) (in proceeding involving whether section 524 discharge was violated by credit card company whose agreement with debtor contained arbitration clause, Second Circuit held that bankruptcy court had discretion to decline to enforce the arbitration agreement; Second Circuit engaged in a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy and determined that arbitrating claims for violations of the 524 injunction would "seriously jeopardize a particular core bankruptcy proceeding" because: "(1) the discharge injunction is integral to the bankruptcy court's ability to provide debtors with a fresh start, (2) the claim relates to an ongoing matter with continuing court supervision, and (3) the equitable powers of the court to enforce its own injunctions are central to the structure of the Code.").

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**CERTIFICATE OF SERVICE**

I, Elliot Bromagen, certify that I am not less than 18 years of age, and that service of the foregoing was caused to be made on November 1, 2019, in the manner indicated on the parties on the attached service list.

Date: November 1, 2019

/s/ Elliot Bromagen  
Elliot Bromagen

**HAND DELIVERY**

([Proposed] Counsel for the Debtor and Debtor in Possession)  
James O'Neill, Esquire  
Pachulski Stang Ziehl & Jones LLP  
919 N. Market Street, 17th Floor  
Wilmington, DE 19899 (Courier 19801)

**OVERNIGHT DELIVERY**

([Proposed] Counsel for the Debtor and Debtor in Possession)  
Richard M. Pachulski, Esquire  
Jeffrey N. Pomerantz, Esquire  
Ira D. Kharasch, Esquire  
Maxim B. Litvak, Esquire  
Pachulski Stang Ziehl & Jones LLP  
10100 Santa Monica Blvd, 13th Floor  
Los Angeles, CA 90067

**HAND DELIVERY**

(United States Trustee)  
Jane M. Leamy, Esquire  
Office of the U.S. Trustee  
J. Caleb Boggs Federal Building  
844 King Street, Suite 2207  
Lockbox 35  
Wilmington, DE 19801

**HAND DELIVERY**

(State Attorney General)  
Kathy Jennings, Esquire  
Delaware Department of Justice  
Carvel State Office Building, 6th Floor  
820 N. French Street  
Wilmington, DE 19801

**HAND DELIVERY**

Zillah A. Frampton  
Bankruptcy Administrator  
Delaware Division of Revenue  
Carvel State Office Building, 8th Floor  
820 N. French Street  
Wilmington, DE 19801

**HAND DELIVERY**

(United States Attorney)  
David C. Weiss  
c/o Ellen Slights  
US Attorney's Office  
District of Delaware  
Hercules Building, Suite 400  
1313 N. Market Street  
Wilmington, DE 19801

**HAND DELIVERY**

(Top 20 Unsecured Creditor)  
Ryan P. Newell, Esquire  
Connolly Gallagher LLP  
1201 N. Market Street, 20th Floor  
Wilmington, DE 19801

**HAND DELIVERY**

(Counsel to Alvarez & Marsal CRF Management, LLC)  
Sean M. Beach, Esquire  
Jaclyn C. Weissgerber, Esquire  
Young Conaway Stargatt & Taylor, LLP  
1000 North King Street, Rodney Square  
Wilmington, DE 19801

**HAND DELIVERY**

(Counsel to the Redeemer Committee of the Highland Crusader Fund)  
Curtis S. Miller, Esquire  
Morris, Nichols, Arsht & tunnel LLP  
Kevin M. Coen, Esquire  
1201 North Market Street, Suite 1600  
Wilmington, DE 19801

**HAND DELIVERY**

(Counsel to Acis Capital Management GP LLC and Acis Capital Management, L.P.)  
John E. Lucian, Esquire  
Josef W. Mintz, Esquire  
Jose F. Bibiloni, Esquire  
Blank Rome LLP  
1201 N Market Street, Suite 800  
Wilmington, DE 19801

**HAND DELIVERY**

(Counsel to Patrick Daugherty)  
Michael L. Vild, Esquire  
Cross & Simon, LLC  
1105 N. Market Street, Suite 901  
Wilmington, DE 19801

**HAND DELIVERY**

(Counsel to Hunter Mountain Trust)  
William A. Hazeltine, Esquire  
Sullivan Hazeltine Allinson LLC  
901 North Market Street, Suite 1300  
Wilmington, DE 19801

**OVERNIGHT DELIVERY**

(Counsel to Acis Capital Management GP  
LLC and Acis Capital Management, L.P.)  
Rakhee V. Patel, Esquire  
Phillip Lamberson, Esquire  
Winstead PC  
2728 N. Harwood Street, Suite 500  
Dallas, TX 75201

**OVERNIGHT DELIVERY**

(United States Attorney General)  
William Barr, Esquire  
Office of the US Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW,  
Room 4400  
Washington, DC 20530-0001

**OVERNIGHT DELIVERY**

State of Delaware  
Division of Corporations - Franchise Tax  
PO Box 898  
Dover, DE 19903

**OVERNIGHT DELIVERY**

Delaware Secretary of Treasury  
820 Silver Lake Blvd, Suite 100  
Dover, DE 19904

**OVERNIGHT DELIVERY**

Office of General Counsel  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

**OVERNIGHT DELIVERY**

Office of General Counsel  
Securities & Exchange Commission  
100 F Street, NE  
Washington, DC 20554

**OVERNIGHT DELIVERY**

Sharon Binger, Regional Director  
Philadelphia Regional Office  
Securities & Exchange Commission  
One Penn Center, Suite 520  
1617 JFK Boulevard  
Philadelphia, PA 19103

**OVERNIGHT DELIVERY**

Andrew Calamari, Regional Director  
New York Regional Office  
Securities & Exchange Commission  
Brookfield Place, Suite 400  
200 Vesey Street  
New York, NY 10281

**OVERNIGHT DELIVERY**

Office of the General Counsel  
Michael I. Baird, Esquire  
Pension Benefit Guaranty Corporation  
1200 K Street, NW  
Washington, DC 20005-4026

**OVERNIGHT DELIVERY**

Internal Revenue Service  
Centralized Insolvency Operation  
PO Box 7346  
Philadelphia, PA 19101

**OVERNIGHT DELIVERY**

BBVA  
Michael Doran  
8080 N. Central Expressway  
Suite 1500  
Dallas, TX 75206

**OVERNIGHT DELIVERY**

NexBank  
John Danilowicz  
2515 McKinney Avenue  
Suite 1100  
Dallas, TX 75201

**OVERNIGHT DELIVERY**

KeyBank National Association  
as Administrative Agent  
225 Franklin Street, 18<sup>th</sup> Floor  
Boston, MA 02110

**OVERNIGHT DELIVERY**

KeyBank National Association  
as Agent  
127 Public Square  
Cleveland, OH 44114

**OVERNIGHT DELIVERY**

Prime Brokerage Services  
Jefferies LLC  
520 Madison Avenue  
New York, NY 10022

**OVERNIGHT DELIVERY**

Office of the General Counsel  
Re: Prime Brokerage Services  
Jefferies LLC  
520 Madison Avenue, 16<sup>th</sup> Floor  
New York, NY 10022

**OVERNIGHT DELIVERY**

Director of Compliance  
Re: Prime Brokerage Services  
Jefferies LLC  
520 Madison Avenue, 16<sup>th</sup> Floor  
New York, NY 10022

**OVERNIGHT DELIVERY**

Frontier State Bank  
Attn: Steve Elliot  
5100 South I-35 Service Road  
Oklahoma City, OK 73129

**OVERNIGHT DELIVERY**

Strand Advisors, Inc.  
300 Crescent Court  
Suite 700  
Dallas, TX 75201

**OVERNIGHT DELIVERY**

The Dugaboy Investment Trust  
300 Crescent Court  
Suite 700  
Dallas, TX 75201

**OVERNIGHT DELIVERY**

Mark K. Okada  
300 Crescent Court  
Suite 700  
Dallas, TX 75201

**OVERNIGHT DELIVERY**

The Mark and Pamela Okada Family  
Trust – Exempt Trust #1  
300 Crescent Court  
Suite 700  
Dallas, TX 75201

**OVERNIGHT DELIVERY**

The Mark and Pamela Okada Family  
Trust – Exempt Trust #2  
300 Crescent Court  
Suite 700  
Dallas, TX 75201

**OVERNIGHT DELIVERY**

Hunter Mountain Investment Trust  
c/o Rand Advisors LLC  
John Honis  
87 Railroad Place Ste 403  
Saratoga Springs, NY 12866

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Acis Capital Management, L.P.  
and Acis Capital Management GP, LLC  
c/o Brian P. Shaw, Esquire  
Rogge Dunn Group, PC  
500 N. Akard Street, Suite 1900  
Dallas, TX 75201

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
American Arbitration Association  
Elizabeth Robertson, Esquire  
120 Broadway, 21st Floor,  
New York, NY 10271

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Andrews Kurth LLP  
Scott A. Brister, Esquire  
111 Congress Avenue, Ste 1700  
Austin, TX 78701

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Bates White, LLC  
Karen Goldberg, Esquire  
2001 K Street NW  
North Bldg Suite 500  
Washington, DC 20006

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
CLO Holdco, Ltd.  
Grant Scott, Esquire  
Myers Bigel Sibley & Sajovec, P.A.  
4140 Park Lake Ave, Ste 600  
Raleigh, NC 27612

**OVERNIGHT DELIVERY**

Cole, Schotz, Meisel, Forman & Leonard,  
P.A.  
Michael D. Warner, Esquire  
301 Commerce Street, Suite 1700  
Fort Worth, TX 76102

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Debevoise & Plimpton LLP  
Michael Harrell, Esquire  
c/o Accounting Dept 28th Floor  
919 Third Avenue  
New York, NY 10022

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
DLA Piper LLP (US)  
Marc D. Katz, Esquire  
1900 N Pearl St, Suite 2200  
Dallas, TX 75201

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Duff & Phelps, LLC  
c/o David Landman  
Benesch, Friedlander, Coplan & Aronoff  
LLP  
200 Public Square, Suite 2300  
Cleveland, OH 44114-2378

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Foley Gardere  
Holly O'Neil, Esquire  
Foley & Lardner LLP  
2021 McKinney Avenue Suite 1600  
Dallas, TX 75201

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Joshua & Jennifer Terry  
c/o Brian P. Shaw, Esquire  
Rogge Dunn Group, PC  
500 N. Akard Street, Suite 1900  
Dallas, TX 75201



**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Lackey Hershman LLP  
Paul Lackey, Esquire  
Stinson LLP  
3102 Oak Lawn Avenue, Ste 777  
Dallas, TX 75219

**OVERNIGHT DELIVERY**

Lynn Pinker Cox & Hurst, L.L.P.  
Michael K. Hurst, Esquire  
2100 Ross Avenue, Ste 2700  
Dallas, TX 75201

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
McKool Smith, P.C.  
(Top 20 Unsecured Creditor)  
Gary Cruciani, Esquire  
300 Crescent Court, Suite 1500  
Dallas, TX 75201

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Meta-e Discovery LLC  
Paul McVoy  
Six Landmark Square, 4th Floor  
Stamford, CT 6901

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
NWCC, LLC  
c/o of Michael A. Battle, Esquire  
Barnes & Thornburg, LLP  
1717 Pennsylvania Ave N.W. Ste 500  
Washington, DC 20006-4623

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Patrick Daugherty  
c/o Thomas A. Uebler, Esquire  
McCollom D'Emilio Smith Uebler LLC  
2751 Centerville Rd #401  
Wilmington, DE 19808

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Redeemer Committee of the Highland  
Crusader Fund  
c/o Terri Mascherin, Esquire  
Jenner & Block  
353 N. Clark Street  
Chicago, IL 60654-3456

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Reid Collins & Tsai LLP  
William T. Reid, Esquire  
810 Seventh Avenue, Ste 410  
New York, NY 10019

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
UBS AG, London Branch and UBS  
Securities LLC  
c/o Andrew Clubock, Esquire  
Latham & Watkins LLP  
555 Eleventh Street NW Suite 1000  
Washington, DC 20004-130

**OVERNIGHT DELIVERY**

(Top 20 Unsecured Creditor)  
Scott E. Gant, Esquire  
Boies, Schiller & Flexner LLP  
1401 New York Avenue, NW  
Washington, DC 20005

**OVERNIGHT DELIVERY**

(Counsel to Alvarez & Marsal CRF  
Management, LLC)  
Marshall R. King, Esquire  
Michael A. Rosenthal, Esquire  
Alan Moskowitz, Esquire  
Gibson, Dunn & Crutcher LLP  
200 Park Avenue  
New York, NY 10066

**OVERNIGHT DELIVERY**

(Counsel to California Public Employees'  
Retirement System ("CalPERS"))  
Louis J. Cisz, III, Esquire  
Nixon Peabody LLP  
One Embarcadero Center, 32nd Floor  
San Francisco, CA 94111

**OVERNIGHT DELIVERY**

(Counsel to Alvarez & Marsal CRF  
Management, LLC)  
Matthew G. Bouslog, Esquire  
Gibson, Dunn & Crutcher LLP  
3161 Michelson Drive  
Irvine, CA 92612

**OVERNIGHT DELIVERY**

(Counsel to Redeemer Committee of the  
Highland Crusader Fund)  
Marc B. Hankin, Esquire  
Richard Levin, Esquire  
Jenner & Block LLP  
919 Third Avenue  
New York, New York 10022-3908

**OVERNIGHT DELIVERY**

(Counsel to Coleman County TAD, et al.)  
Elizabeth Weller, Esquire  
Linebarger Goggan Blair & Sampson, LLP  
2777 N. Stemmons Freeway, Suite 1000  
Dallas, TX 75207

**OVERNIGHT DELIVERY**

(Counsel to Jefferies)  
Patrick Maxcy, Esq.  
Dentons US LLP  
233 South Wacker Drive Suite 5900  
Chicago, Illinois 60606-6361

**OVERNIGHT DELIVERY**

(Proposed Official Committee of Unsecured  
Creditors)  
Bojan Guzina, Esquire  
Matthew Clemente, Esquire  
Alyssa Russell, Esquire  
Sidley Austin LLP  
One South Dearborn Street  
Chicago, IL 60603

**OVERNIGHT DELIVERY**

(Proposed Official Committee of Unsecured  
Creditors)  
Jessica Boelter, Esquire  
Sidley Austin LLP  
787 Seventh Avenue  
New York, NY 10019

**OVERNIGHT DELIVERY**

(Proposed Official Committee of Unsecured  
Creditors)  
Penny P. Reid, Esquire  
Paige Holden Montgomery, Esquire  
Sidley Austin LLP  
2021 McKinney Avenue, Suite 2000  
Dallas, TX 75201

## EXHIBIT 22

**In Re:**  
*HIGHLAND CAPITAL MANAGEMENT, L.P.*  
*Case No. 19-12239(CSS)*

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*December 2, 2019*

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APPX.102399

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2 Motion for Entry of an Order (I) Authorizing Bradley D. Sharp  
3 to Act as Foreign Representative Pursuant to 11 U.S.C. Section  
4 1505 and (II) Granting Related Relief (Docket No. 68).

5  
6 Motion of the Official Committee of Unsecured Creditors for  
7 Entry of an Order Authorizing Filing Under Seal of the Omnibus  
8 Objection of the Official Committee of Unsecured Creditors to  
9 the Debtor's (1) Motion for Final Order Authorizing Continuance  
10 of the Existing Cash Management System, (II) Motion to Employ  
11 and Retain Development Specialists, Inc. to Provide a Chief  
12 Restructuring Officer, and (III) Precautionary Motion for  
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16 Motion of Debtor for Entry of Interim and Final Orders  
17 Authorizing Debtor to File Under Seal Portions of Its Creditor  
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19  
20 Debtor's Application for an Order Authorizing the Retention and  
21 Employment of Foley Gardere, Foley & Lardner LLP as Special  
22 Texas Counsel, Nunc Pro Tunc to the Petition Date (Docket No.  
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Debtor's Application for an Order Authorizing the Retention and  
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2 Motion of the Official Committee of Unsecured Creditors for an  
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4 Bankruptcy Court for the Northern District of Texas (Docket No.  
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A P P E A R A N C E S :

PACHULSKI STANG ZIEHL & JONES LLP

Attorneys for Debtor

BY: JAMES E. O'NEILL, ESQ.

GREGORY DEMO, ESQ.

IRA D. KHARASCH, ESQ.

MAXIM LITVAK, ESQ.

JOHN A. MORRIS, ESQ.

JEFFREY N. POMERANTZ, ESQ.

UNITED STATES DEPARTMENT OF JUSTICE

Office of the United States Trustee

BY: JANE LEAMY, ESQ.

SIDLEY AUSTIN LLP

Proposed Counsel for Official Committee of Unsecured  
Creditors

BY: MATTHEW A. CLEMENTE, ESQ.

PENNY P. REID, ESQ.

DENNIS M. TWOMEY, ESQ.

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YOUNG CONAWAY STARGATT & TAYLOR, LLP

Attorneys for Official Committee of Unsecured Creditors

BY: SEAN M. BEACH, ESQ.

KEVIN A. GUERKE, ESQ.

MICHAEL R. NESTOR, ESQ.

ASHBY & GEDDES, P.A.

Attorneys for Jefferies, LLC

BY: WILLIAM P. BOWDEN, ESQ.

BLANK ROME LLP

Attorneys for Acis Capital Management GP, et al.

BY: JOHN E. LUCIAN, ESQ.

JOSE F. BIBILONI, ESQ.

DENTONS US, LLP

Attorneys for Jefferies

BY: LAUREN MACKSOUD, ESQ. (TELEPHONICALLY)

PATRICK C. MAXCY, ESQ. (TELEPHONICALLY)

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GIBSON, DUNN & CRUTCHER LLP

Attorneys for Alvarez & Marsal

BY: MICHAEL A. ROSENTHAL, ESQ.

JENNER & BLOCK

Attorneys for Redeemer Committee of Crusader Fund

BY: MARC B. HANKIN, ESQ.

TERRI L. MASCHERIN, ESQ.

LATHAM & WATKINS, LLP

Attorneys for UBS Securities LLC and UBS London Bank

BY: ASIF ATTARWALA, ESQ. (TELEPHONICALLY)

JEFF BJORK, ESQ. (TELEPHONICALLY)

ANDREW B. CLUBOK, ESQ. (TELEPHONICALLY)

KUAN HUANG, ESQ. (TELEPHONICALLY)

KIMBERLY A. POSIN, ESQ. (TELEPHONICALLY)

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

Attorneys for Redeemer Committee of Crusader Fund

BY: CURTIS S. MILLER, ESQ.

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POTTER ANDERSON & CORROON LLP

Attorneys for Alvarez & Marsal

BY: JEREMY W. RYAN, ESQ.

ROGGE DUNN GROUP, PC.

Attorneys for Acis Capital Management GP, et al.

BY: BRIAN P. SHAW, ESQ.

SCHULTE ROTH & ZABEL LLP

Attorneys for CLO Entities, Intertrust Entities

BY: JAMES T. BENTLEY, ESQ. (TELEPHONICALLY)

WINSTEAD, P.C.

Attorneys for Acis Capital Management GP, et al.

BY: RAKHEE V. PATEL, ESQ.

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ALSO PRESENT:

ISAAC D. LEVENTON, ESQ., Asst. General Counsel, Highland  
Capital Management  
FRANK WATERHOUSE, Partner and CFO, Highland Capital  
Management  
BRADLEY SHARP, Pres. and CEO, Development Specialists,  
Inc.  
FRED CARUSO, COO, Development Specialists, Inc.

HIGHLAND CAPITAL MANAGEMENT, L.P.

10

1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Please be seated.

4 MR. O'NEILL: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. O'NEILL: James O'Neill, Pachulski Stang Ziehl &  
7 Jones, here today on behalf of the debtor, Highland Capital  
8 Management. With me, Your Honor, at counsel table is Jeff  
9 Pomerantz, Ira Kharasch, John Morris, Greg Demo, and Max  
10 Litvak, representing the debtor. Also in the courtroom with  
11 us, from our client, Isaac Leventon and Frank Waterhouse and,  
12 from DSI, Brad Sharp and Fred Caruso.

13 THE COURT: Welcome.

14 MR. O'NEILL: Your Honor, we have a number of matters  
15 on the agenda today, but we are going to proceed with item  
16 number 12 on the agenda, which is the committee's venue motion.  
17 So I will yield the podium to them.

18 THE COURT: Okay.

19 MR. CLEMENTE: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. CLEMENTE: Matthew Clemente from Sidley Austin,  
22 proposed counsel to the official committee of unsecured  
23 creditors. With me here today, my colleagues Dennis Twomey and  
24 Penny Reid, along with our co-counsel from Young Conaway, Mike  
25 Nestor and Sean Beach.

HIGHLAND CAPITAL MANAGEMENT, L.P.

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1           Your Honor, we have filed our venue motion. We  
2 believe that venue -- it's appropriate to transfer venue to the  
3 bankruptcy court in the District of Texas for the reasons that  
4 we laid out in the motion. Based on Your Honor's --  
5 discussions with Your Honor this morning, we understand that we  
6 would proceed with what I believe would be a short proffer from  
7 the debtor, we would have an opportunity to cross, and then we  
8 would proceed to argument from there. If that's acceptable to  
9 Your Honor, that's --

10           THE COURT: That's fine. Thank you.

11           MR. CLEMENTE: -- that's the way we'd proceed.

12           THE COURT: Yes.

13           MR. CLEMENTE: Thank you, Your Honor.

14           MR. POMERANTZ: Good morning, Your Honor. Jeff  
15 Pomerantz, Pachulski Stang Ziehl & Jones, on behalf of the  
16 debtor. We'd also like at this time, Your Honor, to move into  
17 evidence Exhibits A through U, except for Exhibit G. Exhibit G  
18 is one of those documents that we refer to in chambers as would  
19 be subject to seal. We don't need to refer to it in connection  
20 with the venue motion. But if Your Honor would like, I can  
21 approach with a binder containing the --

22           THE COURT: Yeah, I don't have those.

23           MR. POMERANTZ: -- exhibits. There have been no  
24 objections to them.

25           MR. POMERANTZ: Your Honor, if Mr. Sharp were called

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1 to testify, he would testify --

2 THE COURT: Hang --

3 MR. POMERANTZ: Oh, sorry.

4 THE COURT: Hang on. Okay.

5 MR. POMERANTZ: Okay.

6 THE COURT: Look at the documents. It's the first  
7 I've seen them.

8 (Pause)

9 THE COURT: So you're moving A through U, except for  
10 G?

11 MR. POMERANTZ: Correct, Your Honor.

12 THE COURT: Any objection?

13 MR. CLEMENTE: Sorry, Your Honor, one --

14 THE COURT: No; yeah, that's fine.

15 MR. CLEMENTE: No objection, Your Honor.

16 THE COURT: All right, they're admitted without  
17 objection, other than G. G is not admitted at this time.

18 (Debtors' Exhibits A through U, except for Exhibit G, were  
19 hereby received into evidence, as of this date.)

20 THE COURT: All right, you may proceed with the  
21 proffer.

22 MR. POMERANTZ: Thank you, Your Honor.

23 If Mr. Sharp were called to testify, he would testify  
24 that he is the proposed chief restructuring officer of the  
25 debtor; he's also the president of Development Specialists,



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13

1 Inc., a financial advisory firm. He would testify that he's  
2 been a restructuring professional with over twenty-five years  
3 of experience as a trustee, a chief restructuring officer, and  
4 a financial advisor, in a myriad of industries. He would  
5 testify that he has been appointed as chief restructuring  
6 officer in four cases in Delaware, including In re Variant  
7 before Judge Shannon, In re Woodbridge before Judge Carey, In  
8 re WL Homes before Judge Shannon, and In re Beverly Hills  
9 Bancorp before Judge Carey.

10 He would testify that he has a national practice, he's  
11 physically headquartered in Los Angeles, and it would be as  
12 convenient for him to travel to this court in Delaware than it  
13 would be for him to travel to Dallas. He would testify that  
14 the debtor's counsel, Pachulski Stang Ziehl & Jones, has  
15 offices in Delaware and, if the case were transferred, the  
16 debtor would need to retain local counsel in Dallas.

17 He would testify that he was initially engaged by the  
18 debtor on October 7, 2019 and that, prior to his engagement as  
19 a CRO, he had no prior involvement with Highland or any of its  
20 senior management employees or principals. He would testify  
21 that he was introduced to Highland by Pachulski Stang Ziehl &  
22 Jones.

23 He would testify that, since his engagement, he and  
24 his colleague, Fred Caruso, who functions as an extension of  
25 him in his role as chief restructuring officer, and other

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1 employees of DSI have devoted themselves to learning about the  
2 debtor's business and financial affairs, knowledge that only  
3 increases as the days go by. He would testify that he and  
4 others from DSI have spent hundreds of hours meeting with  
5 various employees of the debtor and reviewing and accessing the  
6 debtor's books and records. He would testify that he's been  
7 given complete access to a wealth of information by the debtor,  
8 and nothing he or his team have requested from the debtor have  
9 been withheld by them.

10 He would testify that the debtor's a limited  
11 partnership organized under the laws of Delaware and that the  
12 debtor's general partner, Strand Advisors, is a corporation  
13 organized under Delaware law as well, and Strand is the manager  
14 of the debtor. He would testify that over ninety-nine percent  
15 of the debtor's limited partnerships are held by Delaware  
16 entities.

17 He would testify that the debtor owns and manages a  
18 sophisticated financial-advisory-services and money-management  
19 business that has assets and interests all over the world; that  
20 the debtor's assets under management, including its own  
21 proprietary assets and those of its clients, through various  
22 related parties, exist in the United States, Asia, South  
23 America, and Europe.

24 He would testify that the debtor has over two-and-a-  
25 half billion dollars of assets under management and receives

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1 management and advisory fees from a multitude of sources around  
2 the world. He would also testify that the debtor provides  
3 shared services for approximately 7.5 billion of assets managed  
4 by a variety of affiliated and unaffiliated entities, including  
5 other affiliated registered investment advisors.

6 He would testify that although the debtor is based in  
7 Dallas, the debtor's affiliates and related parties maintain  
8 offices or have personnel in many international locales,  
9 including Buenos Aires, Rio de Janeiro, Singapore, and Seoul.  
10 He would testify that the debtor owns and manages targeted  
11 funds in Korea, South America, and Singapore.

12 He would testify that the debtor's filed the motion  
13 that's pending today to appoint him as foreign representative  
14 in order to manage certain foreign interests, including those  
15 proceedings pending in Bermuda and Cayman. He would testify  
16 that the principal assets in the United States consist of  
17 custodial and noncustodial interests and investments located  
18 all over the country, and that the debtor's prime brokerage  
19 account that holds the bulk of the debtor's liquid assets is  
20 located in New York City with Jefferies.

21 He would testify the debtor owes approximately 30  
22 million dollars to Jefferies on account of margin obligations  
23 that are secured by the securities in the prime account, and  
24 that the debtor's other principal secured creditor, Frontier  
25 State Bank, is based in Oklahoma City and is owed approximately

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1 5.2 million dollars as of the petition date.

2 He would testify that one aspect of the debtor's  
3 business is management advisory services in connection with  
4 various investments and collateralized loan obligations, or  
5 "CLOs", and that the debtor previously provided submanager,  
6 subadvisory, and shared services to Acis CLOs pursuant to  
7 certain contractual agreements that were terminated during the  
8 course of Acis' bankruptcy in or around August 2018. He would  
9 testify that he's informed and believes that the compensation  
10 structure for subadvisory and shared-service agreements is  
11 different for CLOs than with other types of private equity or  
12 hedge funds that the debtor manages.

13 He will testify that a focus of DSI's efforts in this  
14 case will be to evaluate the appropriateness and the economics  
15 of the shared-service agreements and subadvisory agreements  
16 that the debtor's a party to with both affiliated and  
17 unaffiliated third parties, and he would determine what  
18 modifications are appropriate given the facts and  
19 circumstances.

20 He would testify that, since the petition date and, he  
21 believes, since August 2018, the debtor has not had any direct  
22 business dealings with respect to Acis or the CLO assets for  
23 which Acis serves as CLO manager, and that the debtor no longer  
24 advises or subadvises any active CLOs; the debtor only has CLOs  
25 that are in liquidation and in the process of monetizing their

HIGHLAND CAPITAL MANAGEMENT, L.P.

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1 underlying assets and paying off their remaining investors'  
2 revenues that will decrease over time; and that the CLO portion  
3 of the debtor's business provides just ten percent of the  
4 debtor's revenue, which, again, will shrink over time.

5 He would testify that the debtor derives ninety  
6 percent of its other revenue from managing asset classes that  
7 have nothing to do with Acis, including private equity, hedge  
8 fund, mutual funds, open-ended retail funds, and real-estate  
9 funds.

10 He would testify that the debtors and Acis assert  
11 various substantial disputed and unliquidated claims against  
12 each other, and the debtor has outstanding claims against Acis  
13 that total no less than eight million dollars for services  
14 rendered. He would testify that the debtor and Acis have been,  
15 and continue to be, involved in highly contentious litigation,  
16 including matters that are subject to multiple appeals from the  
17 bankruptcy court and pending fraudulent-transfer claims brought  
18 by Acis against the debtor, in Texas. He would testify the  
19 debtor is currently supporting two pending appeals of orders of  
20 the Texas bankruptcy court, granting the involuntary petition  
21 against Acis and confirming Acis' Chapter 11 plan that put Mr.  
22 Terry in charge of Acis.

23 He would testify that, although he serves subject to  
24 the debtor's ability to terminate him, he has full  
25 responsibility with respect to analyzing and pursuing insider

HIGHLAND CAPITAL MANAGEMENT, L.P.

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1 transactions and is in charge of the debtor's restructuring  
2 efforts, and that he has no prior relationship with either Acis  
3 or the Texas bankruptcy court with respect to this matter. He  
4 would testify that his goal in this case is to maximize the  
5 value of the debtor's estate for the benefit of all  
6 constituents, and he intends to evaluate all available  
7 strategic options for accomplishing the goal, and hopes to work  
8 constructively with the committee in that regard.

9 He believes that the outcome of this case will not  
10 turn on the day-to-day management of the debtor's assets but  
11 instead will be driven by the debtor's ability to restructure  
12 its balance sheet and maximize the value of its assets, many of  
13 which are liquid. He would testify that either he or Fred  
14 Caruso would provide substantially all the testimony that would  
15 be provided for the debtor in this case.

16 Lastly, he would testify that he's been on the job for  
17 over a month-and-a-half, that the debtor has been following the  
18 protocols set out in the motion for which approval is being  
19 sought today. He would testify the debtor's being transparent  
20 with the creditors' committee, has met with and communicated  
21 with FTI on many occasions, and shared a lot of information.  
22 And he would testify that there have been no allegations made  
23 by the committee or any other party, regarding any post-  
24 petition impropriety by the debtor.

25 That concludes my proffer of Mr. Sharp's testimony.

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1 THE COURT: All right, thank you very much.

2 Does anyone wish to cross-examine the witness?

3 UNIDENTIFIED SPEAKER: Yes, Your Honor.

4 THE COURT: Yes?

5 UNIDENTIFIED SPEAKER: Yeah.

6 THE COURT: Okay.

7 MS. REID: Yes, Your Honor.

8 THE COURT: Mr. Sharp, would you please take the  
9 stand? And remain standing for your affirmation.

10 THE CLERK: Would you step up to the stand, please?  
11 Raise your right hand.

12 (Witness affirmed)

13 THE CLERK: Please state and spell your name for the  
14 record.

15 THE WITNESS: Bradley Sharp, B-R-A-D-L-E-Y; last name,  
16 S-H-A-R-P.

17 THE CLERK: Thank you.

18 THE COURT: Very good.

19 MS. REID: Good morning, Your Honor. Penny Reid on  
20 behalf of the creditors' committee.

21 THE COURT: Good morning.

22 Mr. Sharp, just -- you look like a veteran, but if you  
23 could stay close to the microphone, I'd appreciate it.

24 THE WITNESS: Yes, sir.

25 THE COURT: Thank you.

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1 CROSS-EXAMINATION

2 BY MS. REID:

3 Q. Mr. Sharp, you've only met Mr. Dondero once; correct?

4 A. That is correct.

5 Q. And that was in Dallas; correct?

6 A. That is correct.

7 Q. And your team has been at the debtor's offices; correct?

8 A. Yes.

9 Q. And worked over a hundred hours at the debtor's offices;  
10 correct?

11 A. Yes.

12 Q. And that's all been in Dallas; correct?

13 A. Yes.

14 Q. Your team has not been to a New York office; has it?

15 A. No.

16 Q. Has your team -- your team has not been to Korea; has it?

17 A. No.

18 Q. Your team has not been to Singapore; has it?

19 A. With respect to this engagement, no.

20 Q. Okay. And you haven't met any employees in the Singapore  
21 office; have you?

22 A. No.

23 Q. And under this proposed engagement, you're going to report  
24 to Mr. Dondero; correct?

25 A. Yes.



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1 MS. REID: We will reserve our rights to further  
2 question him on the other issues, non-venue issues.

3 THE COURT: Of course.

4 MR. SHAW: Good morning, Your Honor. Brian Shaw on  
5 behalf of Acis Capital Management, a creditor.

6 THE COURT: Yes, Mr. Shaw, you may proceed.

7 CROSS-EXAMINATION

8 BY MR. SHAW:

9 Q. Mr. Sharp, you were hired nine days before the bankruptcy  
10 petition was filed in this case; correct?

11 A. Correct.

12 Q. Other than the retention of DSI, are there any other new  
13 managers at the debtor, that didn't exist prior to the  
14 bankruptcy filing?

15 MR. MORRIS: Objection. Beyond the scope, Your Honor.  
16 This should be a traditional cross.

17 THE COURT: You're going to need to find a microphone  
18 or talk into one that's in front of you.

19 MR. MORRIS: John Morris, Pachulski Stang Ziehl &  
20 Jones, for the debtor.

21 This line of questioning is beyond the scope. This  
22 should be a traditional cross. The moving parties have called  
23 no witnesses, as Your Honor is aware.

24 THE COURT: Well, they reserved the right to call  
25 witnesses based on what you did in your direct. So I'm not

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1 going to hold them to technicalities.

2 You may proceed.

3 MR. SHAW: Thank you, Judge.

4 THE COURT: Do you remember the question, Mr. Shaw?

5 THE WITNESS: I do.

6 A. Not that I'm aware of.

7 Q. Okay. So other than -- so DSI is the only difference pre-  
8 petition and post-petition; is that right?

9 A. With respect to management. Obviously, the company's now  
10 operating in bankruptcy, which is significantly different.

11 Q. You testified, in your proffer, regarding the provision of  
12 shared services and subadvisory to Acis; do you remember that  
13 proffer your counsel commented about?

14 A. I do.

15 Q. And one of the core parts of the debtor's business is the  
16 provision of shared services and subadvisory services to  
17 affiliates and nonaffiliates; right?

18 A. Yes.

19 Q. Okay. And so that was true for Acis and it's true for  
20 current affiliates of the debtor; right?

21 A. Yes, except for, you know, Acis was primarily CLOs, which  
22 is a reducing part of the debtor's business.

23 Q. Do you have any reason to believe that the Northern  
24 District of Texas cannot hear this case expeditiously and  
25 fairly?

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1 A. No.

2 MR. SHAW: Pass the witness.

3 THE COURT: Any other cross-examination?

4 Hearing none, any -- redirect; that's what it's  
5 called. There we go.

6 MR. MORRIS: No, thank you, Your Honor.

7 THE COURT: All right. Thank you, sir. You may step  
8 down.

9 THE WITNESS: Thank you.

10 THE COURT: Any further evidence by any party, in  
11 connection with the venue motion only?

12 MR. CLEMENTE: Your Honor, I believe we would like to  
13 call Mr. Waterhouse to the stand to testify in connection with  
14 the venue motion briefly.

15 THE COURT: All right. Mr. Waterhouse. I thought  
16 we -- there we go. If you could please take the stand as well,  
17 sir, and remain standing.

18 MR. GUERKE: May it please the Court. Good morning,  
19 Your Honor. Kevin Guerke on behalf of the creditors'  
20 committee.

21 THE CLERK: Please raise your right hand.

22 (Witness affirmed)

23 THE CLERK: Please state and spell your name for the  
24 record.

25 THE WITNESS: Yes; it's Frank Waterhouse, F-R-A-N-K,

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1 W-A-T-E-R-H-O-U-S-E.

2 THE CLERK: Thank you.

3 THE COURT: Thank you. Please be seated and try to  
4 remain close to the microphone, if you would, please. It's a  
5 little awkward here.

6 You may proceed.

7 DIRECT EXAMINATION

8 BY MR. GUERKE:

9 Q. Mr. Waterhouse, you've worked for the debtor, Highland  
10 Capital Management, L.P., since 2006; correct?

11 A. Yes.

12 Q. You started there as a senior accountant; right?

13 A. That is correct.

14 Q. You were promoted to chief financial officer at the end of  
15 2011; correct?

16 A. Yes.

17 Q. That's the title that you hold today; right?

18 A. Yes.

19 Q. You also currently hold the title of partner; right?

20 A. Yes.

21 Q. You were made partner three or four years ago; correct?

22 A. Yes. I mean, I don't remember the exact time but, yeah,  
23 approximately three or four years ago.

24 Q. You are an officer in Highland Affiliates; correct?

25 A. Yes.

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1 Q. James Dondero is the president of Highland Capital  
2 Management, L.P.; right?

3 A. Yes.

4 Q. Mr. Dondero owns and controls Highland's general partner,  
5 Strand Advisors, Inc.; right?

6 MR. MORRIS: Your Honor, I'm just going to object for  
7 the record. This is supposed to be a rebuttal witness. This  
8 isn't rebutting anything; it's just new facts --

9 THE COURT: He's laying

10 MR. MORRIS: -- that they're seeking --

11 THE COURT: I'm sure he's laying foundation.

12 MR. GUERKE: I am, Your Honor. It's background, it's  
13 foundation. It has to go (sic) with the organizational  
14 structure.

15 THE COURT: That's fine. Objection overruled.

16 Q. Mr. Waterhouse, Mr. Dondero owns and control Highland's  
17 general partner, Strand Advisors, Inc.; correct?

18 A. I don't remember his exact title but, yes, he is  
19 president.

20 Q. He owns a hundred percent of the equity in Strand; right?

21 A. Yes.

22 Q. He also has a limited-partnership interest in Highland;  
23 correct?

24 A. That is correct.

25 Q. Mr. Dondero's the portfolio manager of all Highland funds;

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1 right?

2 MR. MORRIS: Objection to the form of the question.

3 THE COURT: Overruled.

4 You can answer.

5 A. Yes, he -- he is the portfolio manager or the -- or a co-  
6 portfolio manager. We have several funds. I -- I -- I can't  
7 recall if he is the sole portfolio manager on every single fund  
8 or -- but he -- he -- but yes, he is -- he is a portfolio  
9 manager.

10 Q. As the president of Highland, Mr. Dondero promoted you to  
11 CFO back in 2011; right?

12 A. Yes. My -- my promotion was recommended by the -- the  
13 former CFO and, as president, Mr. Dondero had to, you know,  
14 obviously, approve that taking.

15 Q. You report to Mr. Dondero; right?

16 A. Yes.

17 Q. He's your boss; correct?

18 A. Yes.

19 Q. And after the transition period from the old CFO to you,  
20 you've reported only to Mr. Dondero; right?

21 A. That is correct.

22 Q. After the bankruptcy was filed, you still report to Mr.  
23 Dondero; right?

24 A. Yes.

25 Q. And Mr. Dondero doesn't report to anyone; correct?

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1 A. Yeah, not -- not to my knowledge. Yeah, it's correct.

2 Q. Mr. Dondero has the ability to terminate you; right?

3 A. Again, I -- I assume so. Again, I think I -- I testified  
4 earlier last week, I -- I -- I -- you know, again, I don't know  
5 through this process -- again, I'm not -- bankruptcy is not  
6 something that I -- I am, you know, a specialist. I'm not a  
7 bankruptcy attorney. But maybe the CRO can, or Jim, or  
8 something in -- in conjunction. But I think, theoretically,  
9 yes.

10 Q. Post-bankruptcy, you don't report to Bradley Sharp; right?

11 MR. MORRIS: Objection, Your Honor. Same objection:  
12 beyond the scope.

13 THE COURT: Overruled.

14 A. I do not.

15 Q. Post-bankruptcy, you don't report to Fred Caruso; correct?

16 A. I do not.

17 Q. Mr. Sharp doesn't have the power to terminate your  
18 employment; right?

19 A. Again, I'll --

20 THE COURT: Actually, he already answered that  
21 question; said he wasn't sure.

22 Q. Mr. Waterhouse, there are six groups below Mr. Dondero in  
23 Highland's organizational chart; correct?

24 A. Give or -- give or take.

25 Q. The heads of those groups are the executive-level

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1 management employees that you describe in your declaration that  
2 was submitted in association with the first-day motions; right?

3 A. Yes.

4 Q. You manage one of those teams; correct?

5 A. Yes.

6 Q. Your team is made up of the corporate accounting folks,  
7 Funding Accounting, the tax group, Valuation, Operations,  
8 Retail Fund Operations, Human Resources, and IT; right?

9 A. That -- that is correct.

10 Q. The other Highland teams are the legal-compliance team --  
11 correct?

12 A. Yes.

13 Q. The credit-research team; right?

14 A. Yes.

15 Q. Public-relations team; correct?

16 A. Yes.

17 Q. Private-equity team; right?

18 A. Yes.

19 Q. And the trading team; true?

20 A. Yes.

21 Q. The heads of each one of those groups report up to Mr.  
22 Dondero; isn't that true?

23 A. Yes, and we -- we -- well, and we also -- and -- but we  
24 have a risk-management team as well, at Highland. That -- that  
25 risk-management team reports up through the trading team.



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1 Q. As the CFO, your office is in Dallas, Texas; right?

2 A. Yes. My -- yes, we office in -- or my office is in  
3 Dallas, Texas.

4 Q. That's been the location of your office since you joined  
5 Highland; correct?

6 A. My current location in Dallas, Texas, is not the same as  
7 it was when I joined Highland Capital in October of 2006.

8 Q. You started in 2006 and your office was in Dallas; right?

9 A. Well, my offices were in Dallas but it was not at the same  
10 location as we are currently.

11 Q. Your current offices are also in Dallas; right?

12 A. Yes, their address is in Dallas, Texas.

13 Q. Over seventy Highland employees work out of Highland's  
14 Dallas office; right?

15 A. Yes.

16 Q. Dallas is the only location where Debtor Highland  
17 employees work; correct?

18 A. Yes.

19 Q. Mr. Dondero's office is in Dallas; true?

20 A. Yes.

21 Q. Members of the legal team have offices in Dallas; right?

22 A. Yes.

23 Q. You meet with Mr. Dondero at a minimum of once a week;  
24 correct?

25 A. Yes, give or take.

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1 Q. Usually those meetings are in his office in Dallas; right?

2 A. Yes.

3 Q. All the group heads that we just discussed all have  
4 offices in Dallas; right?

5 A. Yes. We used to -- our -- our risk-management team used  
6 to be officed in New York. But yes, we -- we -- yes.

7 Q. You mentioned New York. There's a location in New York  
8 that we discussed at your deposition; do you remember that?

9 A. Yes.

10 Q. That office in New York is not in Highland -- the debtor's  
11 name; true?

12 A. That is correct.

13 Q. It's in another nondebtor-entity name; correct?

14 A. Yes.

15 Q. There are no Highland employees in that New York location;  
16 correct?

17 A. That is correct.

18 Q. In the proffer that you just heard, and at your  
19 deposition, there was some discussion about offices outside of  
20 the United States. Do you recall that?

21 A. Yes.

22 Q. The people who work in those locations are not employees  
23 of the debtor, Highland Capital Management, L.P.; right?

24 A. That's right.

25 Q. The offices outside the U.S. are subsidiary offices with

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1 subsidiary employees; correct?

2 A. That is correct.

3 Q. You've never been to those offices; right?

4 A. I have not.

5 Q. You have members of team who include David Klos, Clifford  
6 Stoops, and some other folks; right?

7 A. Yes.

8 Q. You have standing weekly meetings with those folks --

9 THE COURT: All right --

10 Q. -- right?

11 THE COURT: -- I'm going to reprimand -- this is well  
12 beyond -- I was giving you some leeway but, if this is what you  
13 wanted to put on -- it's your motion, sir. I mean, this is --  
14 you're laying your foundation in your case-in-chief. Why  
15 didn't you put this on to begin with?

16 MR. GUERKE: Your Honor, it's rebuttal to the proffer  
17 that Mr. Sharp just offered.

18 THE COURT: In what way?

19 MR. GUERKE: Related to the organizational structure  
20 and how decisions are made currently at the debtor.

21 MR. MORRIS: Your Honor, if I may. I don't believe  
22 any aspect of the proffer went to the location of decision-  
23 making.

24 THE COURT: Would you like to reply to that?

25 MR. GUERKE: Yes. The proffer was made that decisions

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1 are made in California and around the country, and around the  
2 world I believe. And this evidence rebuts that; that the  
3 organizational structure and the day-to-day operations are  
4 still run in Dallas, Texas, as they were before bankruptcy.

5 And, Your Honor, I have three questions, then I'll sit  
6 down.

7 THE COURT: Okay. All right, I'll allow it.

8 Q. When you meet with people on your team that we just  
9 identified, you meet with them in Dallas; correct?

10 A. That's correct.

11 MR. GUERKE: Those are my only questions. Thank you,  
12 Mr. Waterhouse.

13 THE COURT: All right.

14 THE WITNESS: Thank you.

15 THE COURT: That was direct. Any further direct?

16 Yes, sir.

17 MR. SHAW: Real briefly, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. SHAW:

20 Q. Mr. Waterhouse, as the CFO of the debtor, were you aware  
21 that the debtor intended to file bankruptcy prior to the  
22 filing?

23 MR. MORRIS: Objection. Beyond the scope.

24 MR. SHAW: Judge, we designated any witness that they  
25 designated, so I don't know that we necessarily have called --

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1 THE COURT: Well, yeah, but it's your motion --

2 MR. SHAW: Correct.

3 THE COURT: -- and you declined to put any evidence on  
4 in support of your motion. They then put on evidence in  
5 opposition to your motion. So you're limited, sir, to  
6 rebutting the evidence they put on. You had your chance to  
7 make your case-in-chief; you decided not to do it. It's not my  
8 fault.

9 MR. SHAW: My understanding was that we were -- that,  
10 depending upon what the proffer was, which we -- we're not  
11 aware of what the proffer was before today, that we reserved  
12 the right to call Mr. Waterhouse, which I understood from our  
13 chambers conference is what we exercised that right to do. If  
14 I misunderstood how procedurally we were going about it,  
15 then --

16 THE COURT: Well, I don't understand how -- that  
17 doesn't make any sense to me. You get a free shot to hear  
18 their case first, and then you get to make your direct case?  
19 Why would I allow that? It's your motion.

20 MR. SHAW: Understood.

21 THE COURT: All right, so let's stick to rebutting  
22 what they put on.

23 MR. SHAW: Okay.

24 THE COURT: I gave a lot of leeway to your colleague;  
25 I'll give you leeway. But I don't really want to sit through

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1 forty-five minutes of direct that you could have done in the  
2 first place.

3 MR. SHAW: And I promise you, I have a very few  
4 limited questions.

5 THE COURT: All right.

6 BY MR. SHAW:

7 Q. With regard -- where is Mr. Dondero today?

8 A. I don't know.

9 Q. For the shared services and subadvisory services that the  
10 debtor previously provided Acis -- are you aware of those?

11 A. I'm aware of them generally.

12 Q. All right. Have you ever reviewed the shared-services and  
13 subadvisory agreements between Acis and Highland?

14 A. I'm sure I reviewed them at -- at some point, but I  
15 honestly can't recall.

16 Q. How are those agreements different than the shared-  
17 services and subadvisory agreements currently between the  
18 debtor and various affiliates?

19 MR. MORRIS: Objection. No foundation.

20 MR. SHAW: It's directly relevant to -- the foundation  
21 being he said he's aware of them. I --

22 MR. MORRIS: The witness just testified that he's not  
23 familiar with them as he sits here --

24 THE COURT: I can't hear you.

25 MR. MORRIS: The witness just testified that he's not

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1 familiar with them as he sits here today. He may have seen  
2 them in some -- at some point in the past.

3 THE COURT: Well, he can qualify the answer further.  
4 Overruled.

5 You can answer.

6 A. You know, again, I -- I don't -- I don't know. I don't  
7 have the documents in front of me. I -- I -- like I said, I'm  
8 generally aware of -- of the Acis agreements. You know, I  
9 don't have these agreements memorized to any certain degree, so  
10 I -- I -- I -- I don't know specifically.

11 Q. As -- you're familiar with the -- as the CFO, with the  
12 shared-services and subadvisory agreements that govern the  
13 seven billion dollars in assets under management that the  
14 debtor provides for affiliates and nonaffiliates; right?

15 A. Yes, I'm generally aware of those agreements.

16 Q. And are those agreements typical in form? Do they differ  
17 widely in their content?

18 A. Again, I don't know -- I mean, they -- they can. Again,  
19 it -- it depends on the nature of the services. And -- you  
20 know, it -- there isn't a standard template, I would say, for  
21 shared services. Yes, they can differ. As I said, I don't  
22 have those agreements memorized, so I can't speak as to how  
23 they are similar or how they are not.

24 MR. SHAW: Pass the witness.

25 THE COURT: Thank you.

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1 I guess it'll be cross of your own witness. Any  
2 cross?

3 MR. MORRIS: No, thank you, Your Honor.

4 THE COURT: All right, sir, thank you. Mr.  
5 Waterhouse, you may step down.

6 THE WITNESS: Thank you.

7 THE COURT: You're welcome.

8 Any further evidence?

9 MS. PATEL: Your Honor, as I referenced, we just have  
10 some exhibits; I believe these to be the unobjected-to pieces  
11 of it. We -- Acis provided a witness-and-exhibit list. These  
12 are the unobjected-to exhibits, and we would just move them in.  
13 And --

14 THE COURT: Is this the ones I already have?

15 MS. PATEL: No, Your Honor. I believe you only have  
16 the debtor's.

17 THE COURT: Yeah.

18 MS. PATEL: And I will apologize, Your Honor; we've  
19 given debtors a copy of the exhibits. Our -- there was  
20 miscommunication. They are not bound.

21 THE COURT: That's fine.

22 MS. PATEL: But they are numbered.

23 THE COURT: All right.

24 MS. PATEL: If I may approach?

25 THE COURT: Yes. Please don't hurt yourself. It's a



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1 bit of a mess there.

2 MS. PATEL: There's a little trash back here.

3 THE COURT: These are all not objected to; is that  
4 correct?

5 MS. PATEL: (Indiscernible), Your Honor, but I go  
6 through them.

7 THE COURT: Are they -- okay.

8 MS. PATEL: What I've handed the Court and to opposing  
9 counsel are Exhibits 1 -- Acis Exhibits 1 through 18, with the  
10 exclusion of Exhibit 3 and Exhibit 9, which were objected to;  
11 and then also Exhibit Numbers 24 and 25, which were not  
12 objected to. We do have one additional exhibit, Your Honor,  
13 that was objected to, that I would like to move in.

14 THE COURT: All right. Is there any objection to the  
15 admission of the documents that counsel has represented there's  
16 no objection to?

17 MR. MORRIS: No, Your Honor.

18 THE COURT: Okay. They are admitted without  
19 objection.

20 (Acis' Exhibits 1 through 18, with the exception of Nos. 3  
21 and 9; and Exhibits 24 and 25, were hereby received into  
22 evidence, as of this date.)

23 MS. PATEL: If I may approach, Your Honor?

24 THE COURT: Yes.

25 Thank you.

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1 MS. PATEL: And, Your Honor, my co-counsel will handle  
2 that -- will handle it since we -- this was a late objection  
3 and he prepared with respect to this; I prepared with respect  
4 to argument.

5 THE COURT: Okay.

6 Yes, sir.

7 MR. CLEMENTE: I believe there's a hearsay objection  
8 regarding this.

9 MR. MORRIS: Relevance and hearsay, Your Honor.

10 THE COURT: Okay.

11 MR. CLEMENTE: Your Honor, I'll address hearsay first.  
12 Federal Rule of Evidence 807 is a residual exception to the  
13 hearsay rule; provides that a hearsay statement is admissible  
14 if the statement is supported by sufficient guarantees of  
15 trustworthiness, after considering the totality of the  
16 circumstances under which it was made and evidence, if any,  
17 corroborating the statement, and (2) it is more probative on  
18 the point for which it is offered, than any other evidence that  
19 the proponent can obtain through reasonable efforts.

20 This is an email exchange between counsel for Acis and  
21 the courtroom deputy for Judge Jernigan, just requesting and  
22 ask -- inquiring about the court's availability. Everything  
23 about that email supports the fact that it is -- that it is  
24 authentic and that there's no question about whether or not it  
25 is -- it's trustworthy. How would we put on evidence of

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1 whether or not Judge Jernigan in the Northern District of Texas  
2 has sufficient time to hear these numerous motions that are  
3 set, other than by providing something like this? I mean, we  
4 can't call or depose the courtroom deputy or the judge. So  
5 based upon that, also -- there also is an exception, under the  
6 hearsay rule, to a public record. I think this also falls  
7 within that exception to the rule. So for that reason, we  
8 don't believe the hearsay objection is proper.

9 As far as relevance, it goes to the argument about  
10 transfer and whether or not the transferee court can  
11 expeditiously hear the matter. And that's one of the elements  
12 and one of the core questions about judicial efficiency.

13 So for those reasons, we believe that the objections  
14 are not well-founded and we offer this exhibit. And it's  
15 Exhibit 26.

16 THE COURT: Reply?

17 MR. MORRIS: Briefly, Your Honor.

18 THE COURT: Yes.

19 MR. MORRIS: I'm not aware of any case where a court  
20 has ever considered, let alone decided, a venue motion on the  
21 availability of another court's time. So I don't think it's  
22 relevant at all. I do think it's an out-of-court statement  
23 being offered for the truth of the matter asserted, and I do  
24 believe it's hearsay.

25 MR. CLEMENTE: It most certainly is hearsay, Judge;

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1 just to respond. But the question is not whether it's hearsay  
2 but whether it's admissible. And of course the Court is well  
3 aware that hearsay can be admissible, and one of the exceptions  
4 is the exception that I outlined.

5 THE COURT: All right, I'll overrule the objection and  
6 admit the document. It is hearsay but it clearly meets the  
7 reliability aspects for the exception to hearsay. With regard  
8 to the relevance, I think its relevance is very -- well, let me  
9 put it this way; I think it's tangentially relevant. I mean,  
10 it certainly is relevant whether the Northern District of Texas  
11 has the ability to handle the case were it transferred there.  
12 To me that's -- I don't even think that's disputed, I mean,  
13 it's obvious, it's a fantastic bankruptcy court. They're more  
14 than capable of handling it. So I -- it's probably  
15 duplicative, if nothing else.

16 Also, it's very carefully written so that you don't  
17 actually identify what case you're talking about. So whether  
18 the courtroom deputy realized what you were saying or not  
19 saying with regard to this specific motion is obviously  
20 unclear. But I will allow it for very limited purposes.

21 (Email exchange between Acis' counsel and Hon. Jernigan's  
22 courtroom deputy was hereby received into evidence as Acis'  
23 Exhibit 26, for the stated limited purposes, as of this date.)

24 MR. CLEMENTE: Thank you, Your Honor.

25 THE COURT: Any other evidence?

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1 I'm going to -- all right, last chance. I'm going to  
2 close the evidentiary record.

3 All right, the evidentiary record's closed. Let's  
4 take a short recess; then I'll hear argument. We will start  
5 with the movants and their supporters, and then we'll turn it  
6 over to the debtor. Okay? We'll take a short recess.

7 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

8 (Recess at 10:48 a.m. until 11:05 a.m.)

9 THE COURT: Be seated. Sorry about the delay. We had  
10 some computer difficulties. But they're all ironed out.

11 You may proceed.

12 MR. CLEMENTE: Thank you, Your Honor. Again, Matthew  
13 Clements from Sidley Austin, on behalf of the committee.

14 Your Honor, to begin, everything we rely on in our  
15 venue argument is uncontested and uncontroverted and is in the  
16 record that either the debtor's exhibits or the Asic's (sic)  
17 exhibits or the record of this case, or published opinions of  
18 the Dallas bankruptcy court, and which Your Honor can take  
19 judicial notice of -- we believe that that record more than  
20 amply carries our evidentiary burden with respect to the venue  
21 motion.

22 With respect to the Sharp proffer, Your Honor, it  
23 attempted to create the appearance of a debtor with operations  
24 in far-flung jurisdictions, employees at nondebtor entities  
25 that may be located in places other than Dallas, offices that

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1 may be in New York that aren't actually debtor offices. And  
2 the testimony of Mr. Waterhouse rebutted that and made clear  
3 that the debtor has no employees other than in Dallas and that  
4 Mr. Dondero makes all of the decisions, and he is in Dallas.  
5 The nerve center of this debtor is in Dallas. And we wanted to  
6 make that clear, Your Honor, after the proffer, the rebuttal,  
7 and the evidentiary record. We believe that the evidentiary  
8 record is largely uncontroverted with respect to the arguments  
9 that we're going to be made (sic) in our venue motion, and that  
10 Mr. Sharp's testimony has been effectively rebutted.

11 With that, Your Honor, we believe that this case is  
12 atypical and presents a set of unique facts which we believe  
13 are uncontroverted, that warrant transfer of venue to the  
14 Dallas bankruptcy court. And frankly, Your Honor, it does beg  
15 the question as to why the debtor chose not to file in Dallas,  
16 what we believe the most logical venue is, in the first  
17 instance. Let's talk about some of these unique facts here;  
18 then we'll move into some of the arguments we made in our  
19 motion, and then we'll talk about some of the things that the  
20 debtor made (sic) in its reply.

21 First and perhaps most importantly, which is obvious  
22 from the nature of this proceeding, not a single creditor or  
23 party-in-interest has filed papers supporting the debtor's  
24 venue in Delaware, other than, obviously, the debtor. The  
25 official committee has unanimously supported venue transfer to

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1 Dallas, Texas. Acis, in its own capacity as creditor, has  
2 joined the transfer request. It's not surprising to us, Your  
3 Honor, that no creditor has affirmatively come out in favor of  
4 venue in Delaware, because the debtor is in Dallas and, in  
5 fact, that is where its nerve center is.

6 Your Honor, we do believe that it's particularly  
7 significant because in this case, although schedules and  
8 statements have not yet been filed, the creditors' committee  
9 makes up the vast majority of creditors in this case, in terms  
10 of absolute dollar amounts. There may be multiple creditors in  
11 number, but the vast majority of dollar amount of creditors are  
12 represented by the official committee of unsecured creditor  
13 (sic).

14 There was reference to Jefferies. They're owed thirty  
15 million dollars. There was reference to Frontier Bank.  
16 They're owed five million dollars. A single claim of one  
17 committee member dwarfs that by multiples, Your Honor. So we  
18 believe the fact that no other creditor supports venue in  
19 Delaware is a very significant fact, Your Honor, and is not  
20 controverted.

21 Second, Your Honor, until a few months ago, the Acis  
22 case, which is pending in the Dallas bankruptcy court, was an  
23 affiliated case. And again, this can be gleaned from the  
24 published decisions and the record that's been put into  
25 evidence. Had this case been filed prior to confirmation of

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1 the Acis plan, under Rule 1014 the Dallas bankruptcy court  
2 would be the appropriate court to determine venue. And  
3 although I would never suppose to predetermine how a judge  
4 would rule, I think there would have been a high probability  
5 that the Dallas court would have taken venue over the debtor's  
6 case.

7 This is important, Your Honor, because the third point  
8 I'd like to make is that Highland and the debtor, and as we  
9 have described in our papers and related attachments, and as  
10 Mr. Sharp referred to in his proper -- in his proffer, has  
11 itself filed an appeal, seeking to overturn the confirmed Acis  
12 plan of reorganization and return the equity that was  
13 distributed to Mr. Terry under that confirmed plan, to an  
14 entity called Nutro (ph.).

15 Second on Nutro, Your Honor. Nutro's wholly owned by  
16 Mr. Dondero and, therefore, if Acis were returned underneath  
17 Nutro, it would become an affiliate of this debtor, and Acis  
18 would once again be subject to, as an initial matter, a  
19 venue -- excuse me, this debtor would be subject to, as an  
20 initial matter, a venue determination by the Dallas bankruptcy  
21 court. If we have a successful appeal, we would have  
22 affiliated cases with dueling jurisdictions, Your Honor, and  
23 the Dallas bankruptcy court, as I mentioned, would determine  
24 venue.

25 On that, Your Honor, the debtor must believe -- it's



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1 not just me speculating. The debtor must believe that there is  
2 a material possibility of this occurrence, as it has been  
3 seeking to employ counsel -- and you'll hear about that  
4 shortly -- and expend estate resources on behalf of Nutro, a  
5 nondebtor affiliate, in an attempt to have the Acis  
6 confirmation order overturned, with, again, the result being  
7 Acis would, again, be a debtor affiliate. Therefore, the  
8 debtor cannot argue that such possibility does not materially  
9 impact the venue decision or is remote, in particular where  
10 they're trying to convince the committee and this Court to use  
11 estate resources to achieve that very outcome. The debtor's  
12 effectively arguing for a ruling on appeal, but the debtor is  
13 an affiliate of Acis, in which case the current Chapter 11  
14 proceeding should be in Dallas, Texas.

15 Fourth, Your Honor --

16 THE COURT: Well --

17 MR. CLEMENTE: Yes, Your Honor.

18 THE COURT: -- let me interrupt you for a moment,  
19 because that hasn't happened. As we sit here today --

20 MR. CLEMENTE: That's correct, Your Honor.

21 THE COURT: -- they're not affiliates. There seems to  
22 be an assumption that, were this case to be transferred to the  
23 Northern District of Texas, it would be assigned to -- sorry,  
24 I'm losing my notes --

25 MR. CLEMENTE: Judge Jernigan, Your Honor.

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1 THE COURT: Jernigan, yes. Thank you. Sorry. I know  
2 Judge Jernigan fairly well.

3 But if they're not affiliates, isn't the case subject  
4 to random assignment under the normal procedures in the  
5 Northern District of Texas? And if it's not assigned to Judge  
6 Jernigan, don't your arguments about judicial knowledge and  
7 experience in connection with this case fall away because  
8 nobody other than Judge Jernigan has that special knowledge in  
9 Texas? And all -- what other colleagues would be able to do  
10 there is simply walk down the hall and talk to her. And of  
11 course, I can pick up the phone and talk to her any time, as  
12 well.

13 So I'm just teasing out this assumption that  
14 definitely feels to be behind everybody's arguments, that she's  
15 going to get this case. Is there anything in the record that  
16 would support that? Is there some sort of rule I'm not aware  
17 of in Texas or that I'm -- am I assuming something that's not  
18 consistent with practice down there, which is that this case  
19 would be randomly assigned?

20 MR. CLEMENTE: Your Honor, I believe you are correct  
21 in the sense that the case would be randomly assigned, but I  
22 believe Your Honor could look at -- as I understand, there are  
23 three judges located in the Dallas court district; one is  
24 obviously Judge Houser. I could be getting the name wrong.  
25 But she's overseeing the Puerto Rican proceeding --

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1 THE COURT: Um-hum.

2 MR. CLEMENTE: -- so her docket is clearly beyond --

3 THE COURT: She's also --

4 MR. CLEMENTE: -- full.

5 THE COURT: -- about to retire, so I don't even know  
6 if she's taking new cases.

7 MR. CLEMENTE: Correct. So that leaves two judges,  
8 Your Honor. And we understand -- perhaps Acis' counsel would  
9 be able to expand on that, given their familiarity with the  
10 Dallas bankruptcy court, but that judge is not being assigned  
11 new cases, given a circumstance with that particular judge.

12 But to answer your direct question, Your Honor, I  
13 believe you are correct; it would be a random assignment. But  
14 we do believe that there is a high probability it would wind up  
15 with Judge Jernigan.

16 THE COURT: But it might be a pool of one; right?

17 MR. CLEMENTE: That is correct, Your Honor. And even  
18 if it wasn't, I think, clearly, for all the reasons we'll  
19 discuss, we would have a very strong case to make that it  
20 should be transferred to Judge Jernigan, even if it initially  
21 got somebody else on the --

22 THE COURT: Well, you know, I mean, if a judge were a  
23 lawyer, a judge couldn't have both these cases. A judge (sic)  
24 couldn't have a case with two warring former affiliates,  
25 because it would create a conflict of interest. Now, those

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1 rules don't apply to judges. We're assumed to be above all  
2 that. But -- since we don't have clients. But it does -- it  
3 might inform someone's decision about do I really feel  
4 comfortable having Acis and Highland, given the situation -- I  
5 mean, they wouldn't be jointly administered, certainly, of  
6 course. They're --

7 MR. CLEMENTE: That's correct, Your Honor.

8 THE COURT: Again, they're not affiliates, at least as  
9 we stand here today; although the debtors are trying to change  
10 that, purportedly. It might create a situation where a judge  
11 might take that into consideration in deciding whether to have  
12 the case or not. And I --

13 Now, we deal all the time with jointly administered  
14 affiliated cases, right, because there's always intercompany  
15 debt --

16 MR. CLEMENTE: That's correct.

17 THE COURT: -- and we all just assume it away (ph.).

18 MR. CLEMENTE: That's correct, Your Honor.

19 THE COURT: But this is a little different in that  
20 they're not affiliates.

21 MR. CLEMENTE: I do think, Your --

22 THE COURT: Again, she would -- the judge wouldn't be  
23 required -- Judge Jernigan wouldn't be required -- it's not a  
24 recusal issue. It's not a disqualification issue. It's just  
25 a -- sort of something to think about in making the decision.

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1 MR. CLEMENTE: I don't disagree, Your Honor. I do  
2 think Your Honor hit on it, though. Bankruptcy judges are  
3 unique in that perspective that they're put in situations all  
4 the time where a decision may impact one particular entity to  
5 the detriment of another entity that's also before Your Honor  
6 in connection with a particular bankruptcy proceeding.

7 THE COURT: Yeah.

8 MR. CLEMENTE: With that, Your Honor, I'll continue to  
9 move forward.

10 THE COURT: Yeah, please.

11 MR. CLEMENTE: Fourth, and this gets back to the point  
12 we were just discussing with Your Honor, we do not believe  
13 there's any credible dispute that the Dallas court has already  
14 upped the learning curve relative to this Court. Again, not  
15 that Your Honor wouldn't be able to come up to speed and that  
16 Your Honor has tremendous capacity to do that, but the record  
17 is clear, from our perspective, that the Dallas bankruptcy  
18 court has already had to wrestle with issues involving the  
19 debtor. There has been extensive proceeding (sic) in the  
20 Dallas bankruptcy court, not just the bankruptcy court but also  
21 the district court, with respect to the Acis case.

22 There are several written opinions, again, that Your  
23 Honor can take judicial notice of and which are also in the  
24 record, that provide, after an extensive and developed factual  
25 record, that Acis only operated through Debtor Highland -- the

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1 debtor, Highland. It is clear that the Dallas court had to  
2 develop an understanding of how the debtor's complex business  
3 worked. It is the same business as the debtor engages in here,  
4 albeit a subset.

5 That's consistent with Mr. Sharp's testimony. Mr.  
6 Sharp didn't say that they no longer are in the CLO business.  
7 He characterized it in a certain fashion, but the debtor  
8 clearly still manages and advises CLOs. That is a part of the  
9 debtor's business. That is what was at issue in the Acis  
10 proceeding. And also, as Mr. Waterhouse testified to quite  
11 clearly in the rebuttal, and as Mr. Sharp testified to in the  
12 cross, it's the same principal actors: Mr. Dondero and others  
13 on his management team.

14 Your Honor, this case, although the idea is to get a  
15 fresh start, we believe will necessary require a backward-  
16 looking review of the facts. And the Dallas court has upped  
17 the learning curve from that perspective. The committee  
18 recognizes that the Dallas court would take time and determine  
19 issues as presented to it. And depending on the issue, the  
20 past experience of the court will have varying degrees of  
21 relevance. But that experience is nonetheless important to the  
22 committee to ensure maximum efficiency, with an entity that has  
23 demonstrated itself to be highly litigious, Your Honor. One  
24 needs only to review the top-twenty list of creditors, made up  
25 largely of law firms and other professionals, to make the

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1 determination that the debtor is highly litigious, as well as  
2 the record in this proceeding.

3 So Your Honor, those four facts, we believe, are  
4 unique, and we believe that they strike in favor of  
5 transferring venue to Dallas. I do want to walk through some  
6 of the arguments we made in our papers, as well, but I wanted  
7 to highlight what we believe are truly distinguishing features  
8 of this particular situation.

9 Your Honor, as we more fully lay out in our papers, we  
10 do believe the convenience of the parties supports transfer of  
11 venue. The debtor's nerve center is in Dallas; Mr. Waterhouse  
12 was clear on that. Mr. Dondero is the portfolio manager for  
13 all of the Highland funds, and he is the one-hundred-percent  
14 owner of Strand. Strand's the general partner of this debtor.  
15 All decisions run through Mr. Dondero. And it's clear that Mr.  
16 Dondero and all of the other key personnel are located in  
17 Dallas.

18 Your Honor, a large number of creditors are located in  
19 Dallas; you need not look past the list of twenty largest  
20 unsecured creditors to determine that. There are almost a  
21 majority of those creditors that are located in Texas. While  
22 the committee agrees that the overall organization with several  
23 thousand affiliates is complex -- and you'll hear about that as  
24 we go on this afternoon -- there's 2,000 affiliated entities  
25 with Highland -- the debtor is only Highland. And so the idea

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1 that there may be offices in far-flung jurisdictions, those are  
2 not debtor offices.

3 Your Honor, the interests of justice also support the  
4 transfer of venue. The Dallas bankruptcy court has clearly  
5 invested time and resources that are applicable to this debtor.  
6 In this context, the learning curve that is referred to in the  
7 cases clearly favors transfer of venue to Dallas. Although  
8 this case has been pending for a while, Your Honor, there's  
9 only been a first-day hearing with very limited relief granted,  
10 and one brief status conference.

11 There are also economic efficiencies in Dallas.  
12 Dallas is convenient for all debtor employees. Yes, people can  
13 get on planes, but it's hard to argue that being a mile-and-a-  
14 half away from the courthouse isn't more convenient.

15 THE COURT: I don't know. Parking's tough.

16 MR. CLEMENTE: And perhaps an overnight trip is  
17 helpful for the family life, Your Honor. It depends.

18 Dallas is convenient for the professionals. It's easy  
19 to fly in and out of Dallas, as we point out in our papers,  
20 Your Honor. There's no real, I believe, disagreement that  
21 Dallas would not be convenient.

22 Additionally, Your Honor, and we think that this is a  
23 unique factor as well, if the long history of Highland's  
24 litigious nature is any indicator here, there will be discovery  
25 disputes. And under Rule 45, contested nonparty discovery



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1 would likely occur in the Northern District in Texas, in  
2 Dallas. Given the massive number of nondebtor affiliates --  
3 again, we only have 1 box here; there's, like, 2,000 others.  
4 It is highly likely that nonparty discovery will become an  
5 issue.

6 The fact that -- I heard Mr. Sharp testify in his  
7 proffer that he believes he and Mr. Caruso will provide all of  
8 the testimony. That's great and good and well for him to think  
9 that. I think the committee's going to take a different view  
10 of that, Your Honor.

11 Our own limited history in this case shows the  
12 relevance of Dallas. Two of the three depositions occurred in  
13 Dallas. I believe we informed Your Honor of that on the status  
14 call that we had. And the third didn't, only because we  
15 believe Mr. Sharp was not able to travel to Dallas.

16 The justice that the debtor seeks in the Acis case,  
17 Your Honor, yields a result that this places -- excuse me, Your  
18 Honor. The justice that we talked about in the appeal with  
19 respect to the Acis confirmation order yields a result that  
20 places this debtor in the Dallas bankruptcy court, which is  
21 also in the interest of justice.

22 So, Your Honor, we believe there are several unique  
23 factors. We believe that the traditional factors, as we lay  
24 out in our papers, support the transfer of venue. And I wanted  
25 to just briefly touch on some of the objections that the debtor

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1 raised to our venue motion. First, the debtor thinks too  
2 little of the Dallas court, in asserting that we're trying to  
3 gain some type -- the committee is trying to gain some type of  
4 litigation advantage. We have no doubt, as Your Honor has  
5 tremendous respect for the Dallas court, that the Dallas court  
6 will take each issue as it comes to it, without prejudice or  
7 predetermination. History and experience doesn't mean  
8 prejudice or predetermination; it just means familiarity, Your  
9 Honor. That's all it means.

10 Our point is simply that the Dallas court clearly had  
11 to spend time wrestling with the debtor, how it operated, and  
12 its opaque structure. And let me spend a second on how. As we  
13 point out in our reply and, again, as the record is clear based  
14 on the published opinions, Acis had no employees; it was a box.  
15 And it subcontracted its management services to the debtor.  
16 The Dallas court examined that contract, that subadvisory  
17 agreement that Mr. Sharp and, I believe, Mr. Waterhouse  
18 referred to, and had to become familiar with it. That's clear  
19 from the published opinions. And the debtor has numerous other  
20 similar contracts.

21 The Dallas court also made determinations -- and  
22 these, again, are in published opinions -- whether certain of  
23 the debtor's contracts with Acis were personal-services  
24 contracts. Again, they may differ, Your Honor, in terms of the  
25 specifics, but these are clear examples of where the Dallas

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1 bankruptcy court had to wrestle with contracts of Highland, the  
2 way Highland operated, and the way that it was managed.

3           Additionally, Your Honor, on the point of litigation  
4 advantage, as I thought about this, I think the debtor's, sort  
5 of, arguments regarding a litigation advantage, frankly, worked  
6 the other way. If I may, here, for a second, Your Honor. Mr.  
7 Dondero is the sole controlling party, as the testimonies made  
8 clear. He's based in Dallas. As we demonstrated in our  
9 papers, Dallas is clearly the most efficient and convenient  
10 forum for the creditors. And the creditors have sent this  
11 message loud and clear through this motion to transfer and the  
12 lack of any party affirmatively supporting the debtor and venue  
13 in Delaware.

14           Mr. Dondero, in our view, as he has shown in the past,  
15 consistently makes decisions that are in his best interest,  
16 potentially fleeing from a jurisdiction and not his creditors.  
17 And we believe that fleeing from the Dallas court, that is,  
18 steps away from his office -- and that is convenient for his  
19 creditors and, frankly, seems to be the most logical choice of  
20 venue -- again, understanding -- we don't dispute that the  
21 debtor is a Delaware limited partnership. We're not disputing  
22 that. But we're talking about what's logical. That's the  
23 point that I would like to make here, Your Honor.

24           Again, back to --

25           THE COURT: Well, I mean --

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1 MR. CLEMENTE: Yes, Your Honor.

2 THE COURT: -- I mean, a cynic -- and after almost  
3 fourteen years, maybe I'm becoming one; I don't know. But a  
4 cynic would say -- and not necessarily badly (ph.), that both  
5 sides want -- are interested in forum-shopping; the debtor  
6 fleeing, obviously, adverse rulings in Texas, and the creditors  
7 fleeing Delaware to go back to the home of adverse rulings  
8 against the debtor in Texas. And it's six one, half dozen the  
9 other. However, at least the cases -- or some of the cases say  
10 that the debtor is entitled to some deference in its forum-  
11 shopping, as opposed to the creditor, in their opposition, in  
12 their forum-shopping. I'm not sure I buy that. And as a  
13 matter of fact, I've ruled previously that there is no  
14 deference --

15 MR. CLEMENTE: Correct.

16 THE COURT: -- that should be afforded to the debtor,  
17 in the EFH case. But --

18 MR. CLEMENTE: That's correct, Your Honor.

19 THE COURT: -- I just throw that out there.

20 MR. CLEMENTE: And I believe Your Honor also made a  
21 point, in the EFH ruling, regarding the support of the various  
22 parties for the venue. And so I believe that is actually a  
23 very strong factor that weighs in favor of transfer to --

24 THE COURT: Well, and -- yeah, I mean --

25 MR. CLEMENTE: -- Dallas.

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1 THE COURT: -- and that case had -- the government of  
2 Texas or the committee, or both, supported venue. That case  
3 probably, thankfully, would have been sent to Texas, freed up  
4 five years of my life, and twenty appeals and --

5 MR. CLEMENTE: You're stronger for it, though --

6 THE COURT: -- everything else.

7 MR. CLEMENTE: -- Your Honor.

8 THE COURT: Yeah -- I don't know about that. I'm  
9 heavier, that's for sure.

10 MR. CLEMENTE: I wish I could blame that for my  
11 weight, Your Honor, but I can't.

12 Your Honor, back -- very briefly, because we did touch  
13 on it already. We do believe that the Dallas court experience  
14 is highly relevant, contrary to what the debtor remarks in  
15 their objection. The debtor again tries to cast the Acis  
16 bankruptcy as being narrow and only involving CLOs. Again, the  
17 testimony, I believe, showed, in -- shows, in point of fact,  
18 the debtor does manage a significant number of CLOs. Even if  
19 they are in liquidation, there are still decisions that are  
20 being made. And therefore, exposure to how the debtor operated  
21 with respect to CLOs is highly relevant.

22 Your Honor, I already mentioned, so I won't repeat  
23 myself, that Acis was a box and it had no employees, and  
24 therefore, obviously, the court had to look through to what was  
25 going on at Highland in terms of how the debtor was managed.

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1           Your Honor, the CRO, unfortunately, I believe, for the  
2 debtor, does not cleanse the venue choice. The CRO was not  
3 around. The CRO didn't decide venue. And as clear from the  
4 testimony, the CRO reports to Mr. Dondero. Nothing has  
5 changed. There has been no management changes. I believe that  
6 was also consistent with the testimony. And everybody still  
7 reports to Mr. Dondero, and he's located in Dallas, and Dallas  
8 is the nerve center.

9           Additionally, as I mentioned, the cases will be very  
10 much about the past, unfortunately, Your Honor, a time when the  
11 CRO was not involved, and about transactions and conduct  
12 engaged in by the debtor and Mr. Dondero in the run-up to this  
13 bankruptcy.

14           In short, I believe the CRO issue is a red herring,  
15 Your Honor; it doesn't erase the history the Dallas bankruptcy  
16 court has with the debtor through the Acis proceeding, and it  
17 doesn't erase the history of the decision-making process that  
18 the debtor engaged in, in the past and currently engages in  
19 today.

20           With that, Your Honor -- we already had a colloquy  
21 about how we do not believe the Dallas bankruptcy court is  
22 conflicted, so I won't spend any further time on that. But I  
23 would like to sum up. Your Honor, let me be very clear. We  
24 have the utmost respect for you and for this Court, so I want  
25 to make sure that Your Honor is very clear on that. However,

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1 the committee respectfully believes that this case presents the  
2 unique combination of facts which dictate that the transfer of  
3 venue to the Dallas bankruptcy court is appropriate.

4 THE COURT: You don't need to worry. My ego assumes  
5 you have respect for me.

6 (Laughter)

7 MR. CLEMENTE: Thank you for that, Your Honor. Unless  
8 Your Honor has any questions, I'll sit.

9 THE COURT: I do not. There may be others in support  
10 who want to be heard.

11 Mr. Pomerantz (sic).

12 MR. LUCIAN: Your Honor, for the record, John Lucian  
13 of Blank Rome, local counsel for Acis.

14 Just during the break, we had a binder made for Your  
15 Honor so that the exhibits that Ms. Patel had handed up that  
16 were admitted -- I know Mr. Morris has no objection to us  
17 handing that up, Your Honor. It's the -- 1 through 26, with  
18 the ones that were not admitted. This will save you from --

19 THE COURT: Is that these?

20 MR. LUCIAN: Yeah. That's the -- you got them in the  
21 binder now.

22 THE COURT: Okay. Is this in there --

23 MR. LUCIAN: Yeah.

24 THE COURT: -- the email?

25 MR. LUCIAN: Yes; 26, yes. If you want to switch to

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1 that. Perfect.

2 MS. PATEL: Thank you, Your Honor. For the record,  
3 Rakhee Patel on behalf of Acis Capital Management, L.P., who  
4 joined in the committee's motion. And I will make reference to  
5 those -- certain of those documents. I'm generally loathe to  
6 hand up big binders or big stacks of documents without telling  
7 the Court of what's been handed up. So, very briefly, Your  
8 Honor, I will say, Exhibits 1 and 2 (sic) in the binder are the  
9 involun -- the issue -- I'm sorry, the opinion issued by the  
10 Dallas bankruptcy court, in connection with the involuntary  
11 trial, and Exhibit number 2 is the opinion that was issued in  
12 connection with confirmation of Acis' plan. I would also point  
13 the Court to Exhibit Number 17, which is the actual  
14 confirmation order in Acis Capital Management. And I'll make  
15 reference to one other exhibit as I go through my presen -- or  
16 a number of other exhibits, but -- one additional ruling by the  
17 court, as I go through my presentation.

18 THE COURT: What was the date of -- oh, okay. Never  
19 mind. So the confirmation was late January?

20 MS. PATEL: Yes, Your Honor. January 31st, 2019. And  
21 the plan went effective on February 15th of 2019.

22 THE COURT: Okay.

23 MS. PATEL: And the Highland bankruptcy, I believe,  
24 was just a little bit over eight months later.

25 And, Your Honor, I'll try not to duplicate necessarily



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1 what the committee did, and I will promise to keep this as  
2 brief as I can. I'm happy to answer any questions, because  
3 standing here before you is the counsel -- at least the  
4 bankruptcy counsel that lived and breathed the Acis case from  
5 the date that they were filed on January 30th of 2018, through  
6 today.

7 Now, Your Honor -- and along with my co-counsel, Mr.  
8 Shaw, who has been living and breathing, frankly, the issues  
9 longer than I have, even.

10 Your Honor, I will repeat something that was in our  
11 moving papers. And I know Your Honor and Your Honor's team has  
12 probably read all the moving papers. but I think this bears  
13 repeating, and that is that this case is unique. It is, in my  
14 mind, exceptionally unique. These facts are so unique, Your  
15 Honor, that I would venture to say I don't think that this is  
16 necessarily a case that would even possibly or remotely or even  
17 tangentially open any floodgates, because these facts are so  
18 different from the typical motion to transfer venue.

19 Your Honor, touching quickly on the burden-of-proof  
20 issue that Your Honor referenced in your colloquy with Mr.  
21 Clemente. Your Honor, Acis concedes, obviously, the burden of  
22 proof is clear that it's the preponderance of the evidence.  
23 And I won't go through ad nauseum all of the factors. I know  
24 the Court is exceptionally familiar with all the factors on  
25 both the convenience-of-the-parties and interest-of-justice

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1 side. But I would just note that, at least in the Court's  
2 prior rulings, you've said that the factors are not really a  
3 scorecard, that we're not counting three factors versus three  
4 factors, or four versus two.

5 And I would just --

6 THE COURT: Well, that follows with my fundamental  
7 tenet, which is that any legal test with more than three  
8 factors is useless. It's just a -- it's just a question of  
9 discussion.

10 MS. PATEL: I think -- and I think this Court has wide  
11 discretion with whether to transfer this case or not.

12 Your Honor, one final quick point that I'll call  
13 the -- kind of the four corners or setting the table, for  
14 purposes of go-forward, is back to the reference to the -- that  
15 there's no real deference, necessarily, to the debtor's choice  
16 of venue. That's sort of subsumed in the burden of proof. The  
17 movant bears a burden of proof and, if they meet the  
18 preponderance of the evidence, then the burden shifts. And  
19 that's really kind of where the debtor's choice of forum weighs  
20 in.

21 Now, Your Honor, one other quick point is that there's  
22 been a lot of discussion in the objections and the responses  
23 and the replies, indicating that this whole issue is about Acis  
24 as a creditor. And what I'm here to say, Your Honor, is that  
25 this, actually, the issue, the motion to transfer venue, is not

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1 really about Acis as a creditor. And I'm here representing  
2 Acis as a creditor. This has been painted as there's one  
3 creditor that's driving this, and that's Acis. That's just  
4 simply not the case, Your Honor.

5 The reality is that you've got hundreds of millions of  
6 dollars or claims represented by the committee, as a fiduciary  
7 to those claims, that have made this motion. This is not Acis'  
8 motion. Yes, we did join with respect to it. And really, it  
9 has -- that has more to do with the fact that we're the Texas  
10 folks, we're the Texas creditor. And we -- again, I and Mr.  
11 Shaw lived and breathed the Texas cases. And I'm here to stand  
12 before the Court and answer any questions you may have with  
13 respect to what happened, what transpired, but, more  
14 importantly, what could happen on a go-forward basis.

15 Your Honor, it's important -- and I -- again, harking  
16 back to this concept of this is unique. As Your Honor noted in  
17 EFH, had the committee signed on, had the Texas comptroller  
18 signed on, perhaps that outcome would have been a little bit  
19 different. But here, Your Honor, we've got the committee  
20 moving for transfer of venue. And I think that's really  
21 significant. And I'll go through in a little bit sort of the  
22 debt stack that we're dealing with here, and you'll see that,  
23 hands down, the committee is the fulcrum debt here. It is the  
24 fulcrum debt, Your Honor.

25 Your Honor, one final quick note on forum-shopping.

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1 And there's been conversation with respect to the committee's  
2 forum-shopping, the debtor's relationship. Look, I've read  
3 Your Honor's prior opinions and I really do think the issue  
4 boils down to -- I think it's probably neutral with respect to  
5 both sides. As Your Honor pointed out, the debtor has the  
6 ability to choose the state of its incorporation as its venue  
7 for filing of bankruptcy. And also, the committee has the  
8 ability to move, to transfer, pursuant to 1412, to a place that  
9 is the interest of justice and the convenience of the parties.  
10 I really view that as being the -- there should be no negatives  
11 cast on, frankly, either side, with respect to forum-shopping,  
12 because it's kind of invited by the structure of the statute.

13 So if the case isn't about Acis as a creditor, what is  
14 this case about? Well, I -- or what is this motion about?  
15 Here I really do think that -- at its heart, that this  
16 particular motion to transfer, and probably motions to transfer  
17 in general, boil down to the bankruptcy case itself. So here  
18 that would be -- this is all about Highland's bankruptcy and  
19 where it should be administered, what makes sense.

20 And, Your Honor, I want to go through a couple of  
21 different subtopics on this. First I want to talk about the  
22 business lines that the debtor engages in. What does it do?  
23 And this is all from the -- what I'm going to refer the Court  
24 to is all included in the first-day declaration of Mr.  
25 Waterhouse, which is Debtor's Exhibit O.

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1 And, Your Honor, in Mr. Waterhouse's declaration, he  
2 goes through the three kind of general lines of the debtor's  
3 business. First is proprietary trading. And that involves  
4 sort of trading with the debtor's money or leveraged money in  
5 certain brokerage accounts. And I really think that  
6 proprietary trading is probably that line of business -- when  
7 we're thinking about which court is best suited to oversee that  
8 line of business and what's going to happen with respect to it,  
9 I think that's really neutral. I think both Delaware and  
10 Dallas could adequately handle that issue.

11 The issue really becomes a lot more focused, though,  
12 when we look at the other two lines of business. The next line  
13 of business is investment management services. And this is --  
14 and a big piece of that is the debtor's operation of its CLOs  
15 or collateralized loan obligations.

16 If the 2018 financials -- again, I believe they're  
17 contained in debtor's exhibits -- if you take a look at those  
18 you'll see that as a part of investment management fee revenue,  
19 a lot of the revenue that was generated is related to the  
20 debtor's operation of eighteen CLOs along with some managed  
21 separate accounts, et cetera.

22 Your Honor, the CLO piece and the separate accounts  
23 are issues that the Dallas court was faced with through Acis'  
24 bankruptcy and Highland's management of it. And I'll borrow  
25 from Mr. Clemente his phrase: Acis was effectively a box. It

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1 had no employees of its own. It only had two officers, Mr.  
2 Dondero and Mr. Waterhouse, who was the treasurer of Acis,  
3 until their resignation shortly after the appointment of --  
4 shortly after the involuntary filings and the appointment of a  
5 trustee.

6 Now, Your Honor, the other -- the last piece that's  
7 also involved is shared services. So we've got investment  
8 management, and there's subpieces of it. And I won't represent  
9 to the Court that is Judge Jernigan familiar with every aspect  
10 of Highland's investment management services? No, likely not.  
11 But neither is this Court. This Court is still, very much so,  
12 on the learning curve with respect to that.

13 And I would submit, Your Honor, that Judge Jernigan is  
14 frankly just further along that learning curve with respect to  
15 the investment management services.

16 On shared services, Your Honor, as Mr. Clemente  
17 referenced, the opinions are very clear -- again, Exhibits 1  
18 and 2 -- with respect to there is -- it's clear that Judge  
19 Jernigan had to evaluate shared services. And I'll kind of  
20 summarize what the structure of what Judge Jernigan had to  
21 evaluate was. Again, Acis is a box. It was provided its  
22 services by Highland, pursuant to two key agreements: a  
23 subadvisory agreement and a shared-services agreement. And  
24 that shared-services agreement is relatively generic. And all  
25 that is is the subadvisory -- I like to think of it as that's

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1 the thinking brain stuff. That's the investment advisory.  
2 Does this comply with SEC guidelines? Should these trades be  
3 made? What does the marketplace look like?

4 Shared services, on the other hand, Your Honor, are  
5 all that middle- and back-office typical type stuff. There's  
6 no real rocket science with respect to it. It's just providing  
7 infrastructure: accounting, legal, bookkeeping functions, all  
8 those things that any sort of generic business would provide.

9 And again, that is something that Judge Jernigan is  
10 just more familiar with. She is familiar with Highland's  
11 business modus operandi.

12 And, Your Honor, if you look sort of across the  
13 Highland structure, you will see that Acis really was just a  
14 little microcosm. It's a little template, because it gets  
15 repeated throughout the Highland empire.

16 And one of the exhibits -- and forgive me; I didn't  
17 bring up the other exhibit list, but multiple parties have  
18 designated it, and it's the entities list. And there's 2,000  
19 entities, approximately. I didn't count them all up. But  
20 that's a number that's been thrown around: 2,000 entities  
21 under this. And they are all each little microcosms.

22 Certainly, Judge Jernigan is further along with respect to the  
23 Acis microcosm, but also with respect to the template as well.

24 Your Honor, with respect to then, therefore, economy  
25 or -- judicial economy or efficiency, again, Judge Jernigan,

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1 further along the learning curve.

2 Your Honor, now turning then to the debt stack, as I  
3 had referenced earlier -- again, this is all set forth in the  
4 declaration of Mr. Waterhouse -- you've got two secured  
5 lenders, Jefferies and Frontier. And no one's heard with  
6 respect to -- from them with respect to their position. Your  
7 Honor, these are two creditors that are vastly oversecured, and  
8 so really they -- I'll put them as sort of neutral with respect  
9 to what's going to happen in this bankruptcy case.

10 Then the next item in the debt stack that Mr.  
11 Waterhouse identifies is Highland CLO Management. Well, Your  
12 Honor, it's a note that was transferred -- Highland is the  
13 obligor on the note. It's about nine-and-a-half million  
14 dollars. And it was a note that was previously held by Acis  
15 and that was transferred to an entity by the name of Highland  
16 CLO Management, by Mr. Dondero.

17 Highland CLO Management, in turn -- Mr. Waterhouse  
18 references that there's sort of -- Highland doesn't have a  
19 beneficial interest with respect to it. But if you look at the  
20 retention applications that are set for hearing a little bit  
21 later today, you'll see that actually the debtors (sic) are  
22 claiming there is an interest in this, that the debtor has an  
23 interest in making sure that Highland CLO Management has a  
24 defense when it comes to the issue of was that transfer from  
25 Acis to Highland CLO Management a fraudulent transfer.



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1 And again, these are issues that Judge Jernigan has  
2 had to grapple with all throughout the bankruptcy case. There  
3 have been no -- there has been no adjudication that it was a  
4 fraudulent transfer; but certainly she's had to evaluate it in  
5 connection with four injunctions that were issued in connection  
6 with the Acis case.

7 First there was a -- excuse me -- a sua sponte  
8 injunction. Second there came an ex parte injunction. Third  
9 there was a preliminary injunction. And then fourth there was  
10 a plan injunction. And that plan injunction, Your Honor, is  
11 embodied in Exhibit Number 17. And again, all of these  
12 transfers and transactions -- part of the debt stack of  
13 Highland has been evaluated by Judge Jernigan.

14 Last in the debt stack, but certainly not least, Your  
15 Honor, we have the general unsecureds. And Mr. Waterhouse, in  
16 his deposition that was held in Dallas, estimated that perhaps  
17 the general unsecureds could be upwards of two billion dollars,  
18 all told.

19 Now, just looking at the twenty largest, we're still  
20 in the hundreds of millions, and we don't have the benefit of  
21 schedules yet. But this is -- this is the big dog. This is  
22 the big layer of debt. This is who is really the fulcrum here.

23 And keep in mind, Your Honor, this is a free-fall  
24 bankruptcy. No one knows where this is going to go. At the  
25 first-day hearings, debtor's Counsel referenced that there

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1 could be sales of assets and divestiture of certain things,  
2 operational restructuring. There's really no idea where this  
3 case is headed. And I think that's significant, Your Honor,  
4 because this is an operational restructure or perhaps a  
5 liquidation.

6 I hope not. I hope that this is an operational  
7 restructure and that all creditors can be paid either in full  
8 or close to in full, but that's significant. And the reason  
9 why it's significant here is because, Your Honor, you've got  
10 the fiduciary for that fulcrum debt voting with their feet with  
11 what could happen -- what should happen on a plan.

12 And they're saying we think this case should be  
13 administered in Texas. And I think, again, going back to what  
14 makes this case so unique, I think that's what makes it so  
15 unique is that there are -- just from a dollar perspective and  
16 volume perspective, the significant creditors and the committee  
17 with respect to who's a fiduciary telling you, Judge, we think  
18 this case should be administered in Texas. And those votes are  
19 going to be important with respect to any exit that happens  
20 here.

21 Your Honor, I'll hit sort of on another factor, the  
22 sort of forum's interest or a local interest in the  
23 controversy. And I concede, clearly -- and I think Your Honor  
24 has referenced in the past -- Delaware, when it -- when an  
25 entity is organized under Delaware law, that the forum state

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1 has an interest in protecting its entities. However, I will  
2 say, I think what's different here is --

3 THE COURT: Say that again?

4 MS. PATEL: I'm sorry, Your Honor. I probably  
5 misstated that. That the state of incorporation has an  
6 interest in entities that are --

7 THE COURT: Yeah, but --

8 MS. PATEL: -- formed under its state's law.

9 THE COURT: -- you're in the wrong court for that.  
10 That's state court. This is --

11 MS. PATEL: I'm sorry?

12 THE COURT: -- the --

13 MS. PATEL: Oh, yeah.

14 THE COURT: You're in the wrong court for that. I  
15 don't care about that. This is --

16 MS. PATEL: All right.

17 THE COURT: -- this is federal court.

18 MS. PATEL: Fair enough. I'll take that one, then.

19 THE COURT: This is federal court. That's for the  
20 chancery and the governor.

21 MS. PATEL: Well, Your Honor, and going back just to  
22 the issue of the unique factors here, usually, Your Honor, in a  
23 motion to transfer venue, you have what I'll call relatively  
24 similarly situated courts, certainly if you've got a transfer-  
25 of-venue motion that was filed as early as the one that was

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1 filed in this case, within the first few weeks of the case, and  
2 within, I believe, two days of the committee's formation.

3 That's just not the scenario here, Your Honor. You  
4 have a bankruptcy court in Texas who is familiar with various  
5 aspects of the debtor's business. Is it familiar with every  
6 aspect of the debtor's business? No. But that certainly can't  
7 be said as to the Delaware Court either, that you are familiar  
8 with every aspect of the debtor's business.

9 Your Honor, in Texas there's not only a bankruptcy  
10 court, there's a district court who is familiar with all of  
11 the -- with aspects of the debtor's business, and that is the  
12 Honorable Judge Fitzwater.

13 And what I will say -- Your Honor was asking questions  
14 with respect to the judge -- the bankruptcy judge that it would  
15 be assigned to. I'm happy to address those from my  
16 perspective. But what I will note is that every appeal that  
17 stemmed out of the Acis bankruptcy case -- and there were in  
18 excess of ten -- every single one was transferred ultimately to  
19 Judge Fitzwater for adjudication.

20 So even if -- even if we look just one layer up from  
21 the bankruptcy court to the district court, Judge Fitzwater is  
22 intimately familiar. And now we've got three -- in connection  
23 with the Acis cases -- three appeals that are pending before  
24 the Fifth Circuit, two of which involve Highland or a Highland-  
25 related entity.

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1 Your Honor, I want to quickly touch on the --

2 THE COURT: Is it the practice in the -- it's the  
3 practice in our district court that once a district judge is  
4 assigned an appeal in connection with a bankruptcy, any further  
5 appeals in that bankruptcy go to that district judge. Is that  
6 the practice in Texas?

7 MS. PATEL: It's the practice, Your Honor. I don't  
8 believe that there's a specific local rule that says that that  
9 will happen, but that's functionally what happens. And  
10 sometimes you have to make a motion to transfer between two  
11 courts, but invariably, it usually goes to sort of either the  
12 first-filed court or kind of the first court to really get into  
13 a substantive issue.

14 THE COURT: Okay.

15 MS. PATEL: Your Honor, I'll touch on a couple more  
16 quick points. It is offensive to me when I read through the  
17 debtor's pleadings and that there is an implication that the  
18 Dallas court is somehow biased. I think of Judge Jernigan and  
19 I think of this Court and I think of virtually every bankruptcy  
20 court that I've ever had the privilege of appearing before as  
21 being fair and impartial. And this concept of bias, that's  
22 only grounded in the fact that the debtors have -- or I'm  
23 sorry -- the debtor has lost a few.

24 And I will say, just to kind of forestall that easy  
25 conclusion based on the opinions, I would note, in Acis'

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1 exhibits, if you look at Exhibit Number 12, that is -- it's an  
2 email that the court sent in connection with Acis' first  
3 confirmation hearing. And that was a confirmation hearing that  
4 occurred in August of 2018. And the court ultimately denied  
5 confirmation of the first sort of plan. And there were kind of  
6 three sub-plans. But the court denied it.

7 And so again, I'm offended that there would be even an  
8 implication that the court is somehow biased, because this  
9 isn't a scenario where there have been only adverse rulings to  
10 Highland in connection with the Acis bankruptcy case. Judge  
11 Jernigan has called the balls and strikes as she sees them,  
12 Your Honor.

13 Your Honor, I'll conclude with the following, which is  
14 that I would venture to guess that if this Court were in sort  
15 of -- if we reversed the scenario and this Court had expended  
16 hundreds of hours, hundreds of pages of opinions, untold hours  
17 of its courtroom staff's time, going through and poring through  
18 an exceptionally voluminous record, over 100,000 pages, and  
19 having expended over forty days of courtroom time, with that  
20 significant of an interest in the case and that expenditure of  
21 time, I would venture to guess that this Court would want this  
22 case transferred back to Delaware, if it had been filed  
23 anywhere else.

24 And so I would submit to Your Honor that this Court  
25 should -- this case should be transferred to Dallas for all of

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1 the reasons proffered by the committee and as joined by Acis.

2 Thank you, Your Honor.

3 THE COURT: You're welcome.

4 Anyone else in favor of the motion?

5 All right. This time it will be short. We're going  
6 to take a very short recess, and then I'll hear from the  
7 debtor.

8 (Recess at 11:50 a.m. until 12:00 p.m.)

9 THE CLERK: All rise.

10 THE COURT: Please be seated. I apologize. I know  
11 it's getting warmer and warmer in here. And we're trying to  
12 contact -- we're trying to find someone in Maintenance who's  
13 working today.

14 MR. POMERANTZ: It's usually motivation to get the  
15 hearings done quickly, in my experience.

16 THE COURT: Yeah, it's -- if I take off my robe, don't  
17 be offended. I do have clothes on underneath.

18 MR. BOWDEN: Thank you.

19 THE COURT: I heard you, Mr. Bowden.

20 All right, go ahead.

21 MR. POMERANTZ: Good afternoon, again, Your Honor.

22 Jeff Pomerantz, Pachulski Stang Ziehl & Jones, on behalf of the  
23 debtors-in-possession (sic). Before I go on to my prepared  
24 remarks, I just want to address a couple of the points that  
25 were raised by Mr. Clemente and Acis' Counsel.

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1 First, we are not aware of any formal statement that  
2 Judge Hale, in the Northern District of Texas, is not taking  
3 cases. So I think Your Honor's point was a good one. There's  
4 no definite -- there's no requirement, and it may or may not be  
5 that this case gets transferred, if Your Honor were to transfer  
6 it.

7 Second, Your Honor, Highland has -- there have been  
8 appeals made not only from confirmation of the plan but also  
9 from the involuntary itself. If the involuntary appeal  
10 succeeded, there wouldn't even be a bankruptcy case to be  
11 related to. And in any event, the case law says that events  
12 that may or may not happen in the future are not really  
13 relevant to the venue analysis.

14 Lastly, Your Honor, Mr. Clemente started by saying he  
15 thinks the facts are largely in dispute, and you heard Counsel  
16 then go through in detail, as did Acis' Counsel, about how  
17 there's no dispute that Judge Jernigan has a learning curve.

18 Of course they need to say that because that is the  
19 focus and the crux of their venue-transfer argument. As I will  
20 demonstrate in my comments and as the evidence is before the  
21 Court, other than the opinions that were written and other than  
22 the amount of time the court has spent, there is no real nexus  
23 between what happened in that case and what happened in this  
24 case.

25 We have no doubt that Judge Jernigan learned all about



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1 Acis, learned all about Acis' relationship to Highland. But  
2 the real issue before Your Honor is what does that have to do  
3 with this debtor, this debtor's assets and liabilities, and  
4 this debtor's operations. And as my comments will show, we  
5 think that's a significantly overblown argument.

6 Your Honor, during their presentation, Counsel really  
7 strayed a little bit from what the motion and the joinders sort  
8 of said. There they went through a painstaking analysis of the  
9 various factors supporting venue. I know Your Honor said that  
10 over three factors, you don't find that helpful, but the courts  
11 have relied on a series of factors.

12 And I think the reason why they have strayed away from  
13 that and focused on the committee being the one to support the  
14 transfer-of-venue motion and the facts of the Acis case is  
15 because when you pare it down, the actual factors demonstrate  
16 that there is no way the committee can carry its burden to  
17 demonstrate that venue should be transferred.

18 However -- Your Honor pointed to this at the  
19 beginning, in mentioning comments about forum-shopping -- the  
20 committee and Acis are really being disingenuous, and they have  
21 not told you the real reason that they want the case before  
22 Judge Jernigan.

23 At the first-day hearing, Your Honor, Acis said they  
24 intended to file a motion for an appointed trustee. The  
25 committee has told the debtor it intends to file a motion to

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1 appoint a trustee after this hearing. The motion has not yet  
2 been filed, Your Honor, because they want Judge Jernigan to  
3 rule on that motion. And it's not because she's familiar with  
4 this debtor's business, this debtor's assets, or this debtor's  
5 liabilities, because she generally is not. It is because she  
6 formed negative views regarding certain members of the debtor's  
7 management that the committee and Acis hope will carry over to  
8 this case.

9 The convenience of the parties and the interests of  
10 justice and how this case is so unique are just a pretext.  
11 They want a trustee to run the debtor, and they want Judge  
12 Jernigan and not Your Honor to rule on that motion. That, Your  
13 Honor, is not a proper reason to transfer venue, but rather a  
14 transparent litigation ploy.

15 Similarly, Acis also wants the case to proceed in its  
16 home court where it has enjoyed success in litigating against  
17 the debtor. Your Honor mentioned the conflicts-of-interest  
18 theories. They're not just conflicts of interest between two  
19 jointly administered debtors. These go to the crux of what the  
20 Acis case is about and significant claims against the debtor.

21 The Court may ask, appropriately -- and the Court  
22 did -- why would the debtor file the case in Delaware? Chapter  
23 11 is all about a fresh start. The debtor recognized concerns  
24 that the creditors had with certain aspects of its pre-petition  
25 conduct, and proactively appointed Brad Sharp as chief

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1 restructuring officer with expanded powers, to oversee the  
2 debtor's operations.

3 Mr. Sharp worked with the debtor and Counsel to craft  
4 a protocol for transactions that would be subject to increased  
5 transparency. The debtor didn't have to do that. As Your  
6 Honor mentioned at the first-day hearing, the debtor operates  
7 its business in the ordinary course. But given the  
8 circumstances surrounding this case, given the history, we  
9 felt, and the CRO, importantly, felt it was important to get on  
10 the table what the debtor, through the CRO, believed was  
11 ordinary and what was not, so we could have a transparent  
12 discussion, discussion that, while we've made headway with the  
13 committee, we have not yet been able to come to an agreement.

14 The debtor filed the case in this district because it  
15 wanted a judge to preside over this case that would look at  
16 what's going on with this debtor, with this debtor's  
17 management, this debtor's post-petition conduct, without the  
18 baggage of what happened in a previous case, which contrary to  
19 what Acis and the committee says, has very little to do with  
20 this debtor.

21 These form insufficient grounds, Your Honor, to  
22 overturn the debtor's choice of venue, and the motion should be  
23 denied.

24 I would like to now walk through the statutory  
25 analysis, something that Counsel avoided, because again, I

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1 think it highlights the weakness of their argument.

2 It is clear that the Delaware venue is proper, and  
3 1408 says the places where a Chapter 11 debtor can file the  
4 case. As the vast majority of debtors who file cases in this  
5 district, the debtor filed here because it was domiciled in  
6 Delaware. It is a Delaware LP. But it goes further than that.  
7 99.94 percent of its LP interests are owned by Delaware  
8 entities. And the general partner, Strand Advisors, is a  
9 Delaware general partner.

10 While many cases, Your Honor, before this court, rely  
11 on the domicile of one affiliate to bring other non-Delaware  
12 related affiliates before the court, that's not the case here.  
13 All you have, virtually, are Delaware entities, through the  
14 ownership structure.

15 As I will also discuss in a few moments, Your Honor,  
16 domicile is not the only connection that this debtor has to  
17 this district, as significant litigation matters involving the  
18 debtor, including those commenced by committee members, that  
19 was the catalyst to the filing, are pending in Delaware.  
20 Accordingly, the committee acknowledges, as they must, that  
21 Delaware is, of course, a proper venue.

22 However, they rely on 1412 which sets forth the  
23 standard -- test that the movant has to meet in order to  
24 transfer venue, either for the convenience of the parties or  
25 the interest of the justice.

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1 And courts, including the written opinions in this  
2 district by your colleagues, most often cite to the six factors  
3 in the CORCO decision in the Fifth Circuit in 1979. And as  
4 Judge Gross, in his 2016 opinion in Restaurants Acquisition  
5 makes clear, the movant bears the burden of demonstrating that  
6 the factors strongly weigh in favor of a transfer.

7 Similarly, Judge Gross stated in that case -- and I  
8 know Your Honor may not fully subscribe -- that courts  
9 generally grant substantial deference to the debtor's choice of  
10 forum.

11 And in the case here, where not only do you have the  
12 debtor is a Delaware entity, but virtually all of its holdings  
13 are well -- are Delaware entities as well, it is even more  
14 appropriate to defer to the debtor's choice of forum. As Judge  
15 Walsh said in his 1998 opinion at PWS Holding, it is a  
16 fundamental legal tenet that every citizen of a state is  
17 entitled to take advantage of the state and federal judicial  
18 process in that state.

19 So the question before Your Honor is whether the facts  
20 in this case strongly weigh in favor of a venue transfer such  
21 that the Court will disregard the debtor's reasoned business  
22 judgment to commence the case in this district?

23 We submit, Your Honor, that the committee and Acis  
24 have not come close to meeting that standard, and the CORCO  
25 factors do not support a transfer.

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1           The first one is the proximity of creditors. And the  
2 committee is focused on the fact that the committee -- the  
3 representative fiduciary of the estate -- has determined that  
4 venue is appropriate. But the factor not only looks at the  
5 number of creditors, it looks at the dollar amount of the  
6 creditors. And if you analyze -- an analysis of either  
7 demonstrates that convenience of the parties does not support a  
8 transfer of venue in this case.

9           The debtor has two secured creditors. Jefferies is  
10 headquartered in New York City. Frontier Bank is headquartered  
11 in Oklahoma. There was reference by Acis' Counsel to HCLOF.  
12 Their secured claim is unrelated to the note that was at issue  
13 in Acis, and there's nothing in the record to say that that  
14 secured instrument has anything to do with the Acis case.  
15 Neither of those creditors has weighed in on the motion to  
16 transfer venue.

17           So let's look at the unsecured creditors. Of the  
18 twenty that were listed in the debtor's petition, seven have  
19 Texas addresses. Five of those are debtor's either current or  
20 former law firms. Two of them are in the courtroom today. And  
21 as Your Honor I'm sure appreciates, debtor professionals --  
22 former debtor professionals are not usually active in  
23 bankruptcy cases. Indeed, none of them filed a notice of  
24 appearance in this case.

25           The other two that have Texas addresses are the claims

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1 related to Acis: the Acis claim and the Josh Terry claim.  
2 There are no other unsophisticated creditors that the Court  
3 needs to worry about that would not be able to travel to  
4 Delaware, as needed.

5 The two largest unsecured creditors in the top twenty  
6 are the Redeemer Committee and Patrick Daugherty, each of whom  
7 had pre-petition litigation pending against the debtor that  
8 they each commenced in the Delaware Chancery Court. And the  
9 arbitration proceeding that preceded the Redeemer chancery  
10 court litigation was pending in New York City.

11 UBS, a member of the committee, listed as number  
12 nineteen with a disputed and unliquidated claim, will likely  
13 claim it is the largest creditor of the estate. It is based in  
14 New York. It has litigation pending against the debtor in New  
15 York, and used Latham & Watkins' DC office for that litigation.

16 And lastly, the fifth largest creditor, Your Honor,  
17 Meta-e Discovery, is also on the committee. Where is their  
18 address? Stamford, Connecticut.

19 As Judge Gross reasoned in Restaurants Acquisition, in  
20 order to overcome the strong presumption in favor of the venue  
21 transfer, a transfer must substantially improve the  
22 administrative feasibility with respect to the creditor body as  
23 a whole. So the committee sits out there and Acis sits out  
24 there saying that it's convenient for the creditors, it's much  
25 more convenient in Dallas. Their actions belie their

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1 statements. All this litigation was focused on either Delaware  
2 or the Northeast. It is just simply disingenuous for them to  
3 argue otherwise.

4 The next factor, Your Honor, is the proximity of the  
5 debtor. And in applying this factor, the courts focus  
6 primarily on the parties who appear in court. The debtor  
7 retained Brad Sharp, and he has demonstrated its intention --  
8 and the debtor has demonstrated its intention of having Mr.  
9 Sharp be the face of the reorganization efforts before the  
10 Court.

11 Indeed, in cases where a CRO is reported, Your Honor,  
12 the CRO is more apt to testify in court than any other debtor  
13 representative. And I believe Mr. Sharp's testimony, which was  
14 uncontroverted, was that he expects that he and Mr. Caruso will  
15 provide the bulk of the testimony required from debtor  
16 representatives during this bankruptcy case; and that's because  
17 the debtor has given Mr. Sharp broad authority to evaluate the  
18 propriety of post-petition transactions and to pursue and  
19 analyze insider claims.

20 And at today's hearing the debtor will offer the  
21 testimony of Mr. Sharp and his colleague, Mr. Caruso, to  
22 support the relief requested. They have developed a  
23 substantial amount of knowledge regarding the debtor's assets,  
24 liabilities, and operations, in the six weeks they've been on  
25 the job; and that knowledge will continue to grow.



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1 And Mr. Sharp has significant experience, as he  
2 testified to, being a CRO in cases in this district; and he  
3 could travel just as easily to Delaware as he can to Texas.

4 While the debtor acknowledges that other debtor  
5 employees like Frank Waterhouse may be called to testify, as he  
6 was today, the involvement of the debtor's personnel in this  
7 court is likely to be immaterial. And he was the only Texas  
8 person called to testify in this case. And if the committee  
9 and Acis felt it was so important that representatives of the  
10 debtor be -- it would be easier for them to travel to court,  
11 they didn't call any witnesses in today, which is the most  
12 important hearing in the case.

13 Also, Your Honor, our offices, as you know, are in  
14 Delaware. And while it's true that we practice all around the  
15 country, we would need separate counsel if we were to -- if the  
16 case was to be -- to move.

17 And similarly, the committee retained Young Conaway,  
18 which took a significantly active role in the litigation  
19 leading up to today. That information and knowledge and  
20 expertise would be lost if the case was transferred.

21 Next, Your Honor, related, is the proximity of  
22 witnesses. And as I said, the committee can't demonstrate that  
23 witnesses in this case would find Texas a substantially more  
24 convenient forum than this court. And you would have expected  
25 them to have subpoenaed Texas witnesses if that were so

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1 important.

2 Location of assets, Your Honor, is one of the CORCO  
3 factors. And the committee makes a big point that all the  
4 decision-making is in Texas and all the people are in Texas and  
5 the office is in Texas. The courts that look at location of  
6 assets as being critical typically involve cases that are  
7 single-asset real-estate cases, or cases that are small local  
8 businesses that have significant regional connections.

9 But if you look at the debtor's assets here, it's not  
10 the case. Their assets generally include financial instruments  
11 and investments in a wide variety of public stock; advisory  
12 contracts; shared services; and interests in nonpublic hedge  
13 funds and private equity funds.

14 The assets are located throughout the United States  
15 and in Latin America, Korea, and Singapore. And the majority  
16 of the debtor's liquid assets are in New York. We were not --  
17 we don't dispute the point that there aren't significant people  
18 in Dallas and that the offices are in Dallas and all the  
19 employees. We don't dispute that. But the assets are far-  
20 flung around the country, and the cases, again, that focus on  
21 the assets, focus on local expertise that the court will bring  
22 to bear, particularly in real-estate cases with respect to  
23 valuation. You have nothing of that here.

24 The debtor intends to use its Chapter 11 to provide  
25 breathing room and to evaluate, hopefully in a constructive way

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1 with the committee, how best to maximize value for the debtor's  
2 assets through a consensual restructuring; and there's no  
3 reason to believe why Texas rather than this court, would be a  
4 more appropriate forum for this restructuring.

5 The last factor, Your Honor, is the economic  
6 administration of the estate, which the courts generally point  
7 to as the most important factor. And the committee points to  
8 five reasons, which is essentially retreads of its previous  
9 arguments.

10 Again, they argue a higher concentration of creditors  
11 in Texas and Midwest. That's not the case, as I mentioned.  
12 They argue that there's a higher concentration of professionals  
13 in Texas and Midwest. And if you look at all the  
14 professionals, they're all from national firms; they're all  
15 metropolitan areas that practice routinely before this Court.  
16 And the concept that the flights being different and the  
17 mileage being different is in any way -- is in any way  
18 important, is just not -- is just not the case.

19 People practice in a global, national world, these  
20 days. And if that argument succeeded, most of the -- your  
21 brethren and yourself would not have much to do, because that  
22 argument could support transfers in most cases.

23 THE COURT: Well, I think really goes to why -- I  
24 mean, I know this is the standards that are generally applied,  
25 but it's a case from 1979. It's really behind the times. I

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1 don't think the factors reflect corporate practice of  
2 bankruptcy reality of 2019.

3 MR. POMERANTZ: And that's exactly what Judge Gross  
4 said in the Caesar's opinion --

5 THE COURT: Right.

6 MR. POMERANTZ: -- which is cited in the material,  
7 that this argument, given technology, given frequency of air --  
8 ease of air travel, it's just not a relevant factor anymore.

9 And the two pages that the movants spent in the brief  
10 talking to you about how many direct flights there are from LA  
11 to Delaware as opposed to LA to Dallas, that, Your Honor, I  
12 think is just silly.

13 The committee also argues that most creditors would  
14 need to retain local counsel if they were here. Well, if you  
15 look, the case has been pending a month-and-a-half, and other  
16 than notices of appearance filed by committee members, there  
17 have only been two notices of appearance that have been filed  
18 that are unrelated to debtor entities. And one of those is  
19 Daugherty, who commenced litigation in chancery court. So the  
20 argument that is made typically in cases where they're filed in  
21 jurisdictions far off from where the debtor's operating is, is  
22 that it'll be burdensome on the mom-and-pop creditor, Your  
23 Honor, we don't have mom-and-pop creditors here. And there's  
24 nobody out there with material claims against the estate that  
25 will not have the ability and have trouble and demonstrated the

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1 willingness to hire Delaware Counsel.

2 The last argument --

3 THE COURT: Even when you do have mom and -- again, to  
4 comment on reality, even when you do have mom-and-pop creditors  
5 in businesses that are very locally focused, general practice  
6 today is to make their claims irrelevant, in that to the extent  
7 they have avoidance claims, they're paid on the first day.  
8 Their real concern is whether the business will continue or  
9 not.

10 Now, it's certainly true that pension claims are  
11 important, and proofs of claim are important. But we have  
12 many -- all courts have many procedures in place to ensure that  
13 those types of creditors can participate without having to go  
14 to the courthouse.

15 MR. POMERANTZ: Yes. So, Your Honor, Judge Gross also  
16 mentioned that in the Restaurants Acquisition case, which was a  
17 Texas-based --

18 THE COURT: He's a smart guy.

19 MR. POMERANTZ: We'll be sorry to see him go, Your  
20 Honor.

21 THE COURT: Yeah, absolutely.

22 MR. POMERANTZ: Which was a Texas-based restaurant  
23 chain that had more of a local flair. But he made the comments  
24 Your Honor made.

25 The last argument the committee makes is that Texas is

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1 more convenient. And this is really the crux, which I'll spend  
2 some time over the next few minutes.

3 Texas is more convenient -- convenient -- because the  
4 Texas bankruptcy court, where Acis is pending has, in their  
5 words, already expended great time and effort familiarizing  
6 itself with the debtor and its operations. You've heard  
7 statements like "learning curve". You heard statements about  
8 everything that the debtor -- that Judge Jernigan has found out  
9 about this debtor, and how important and how helpful it is, and  
10 how Your Honor will be behind the learning curve. We just  
11 don't buy that, Your Honor.

12 And aside from that argument, the arguments that the  
13 committee makes for transfer are arguments that could be made  
14 in any case before Your Honor.

15 THE COURT: Yeah, I was going to say that's kind of an  
16 interesting argument, because actually it assumes Judge  
17 Jernigan's going to ignore the rules of evidence in making  
18 factual findings, because you're limited to the record before  
19 you on a specific motion. And what fact you may have learned  
20 with regard to something a person has done, maybe that goes  
21 into questions of credibility on cross-examination or direct  
22 testimony, but to actually base your decision on a fact that's  
23 not in the record for the specific proceeding would be  
24 improper.

25 MR. POMERANTZ: Look, I agree, Your Honor. And the

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1 familiarity with the type of business -- if I wasn't speaking  
2 to Your Honor or your brethren or many other judges around the  
3 country, I'd say well, maybe there are certain judges who  
4 haven't dealt with large financial services company, may not  
5 know what a CLO, may not know what a hedge fund is or private  
6 equity fund is. I'm very confident that Your Honor has had  
7 many cases with sophisticated financial instruments, likely CLO  
8 obligations, so that Your Honor not only has a good base of  
9 knowledge that would give you the same base of knowledge that  
10 Judge Jernigan has, but as we've also found, you are a fairly  
11 quick study and that I have no doubt that you could come up-to-  
12 speed without very little effort.

13         So their argument is a grossly overstated  
14 interpretation of what the Acis case was about and that what  
15 was learned in that case has any relevance. As a part -- as a  
16 result of the Acis plan confirmation, Acis is no longer part of  
17 the debtor's organizational structure. The debtor owns no  
18 equity in Acis. And the debtor no longer provides any advisory  
19 services to Acis.

20         We admit that Judge Jernigan conducted many hearings,  
21 and she issued several lengthy opinions, and she heard from a  
22 variety of witnesses. And I'm sure Your Honor -- if Your Honor  
23 has not -- Your Honor might read the opinions that she wrote  
24 that are attached to the exhibits, the plan confirmation  
25 opinion, the arbitration opinion, the involuntary opinion; and

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1 you will conclude, I believe, as I have concluded, that ninety-  
2 five percent of that stuff has nothing to do with this debtor.

3 It focused on the CLO obligations -- CLO business, the  
4 relationship, the transfers of certain assets away from Acis  
5 that basically Acis is claiming were fraudulent conveyances,  
6 and that was the real focus; not on any of the debtor's  
7 business operations.

8 Acis was the advisory arm through which the debtor  
9 structured its collateral loan portfolio. The fees -- the  
10 uncontroverted evidence is the fees generated from the CLO  
11 business represent approximately ten percent of the debtor's  
12 revenue and that that will reduce over time, because since the  
13 market crash in 2009 the debtor has not created any new CLO  
14 funds. So there's no active management and advisory services  
15 going on for the CLOs. They're just being liquidated in the  
16 normal course. Their importance will continue to decrease.  
17 And even right now, it's only ten percent.

18 The debtor generates its revenues from trading public  
19 securities; its equity positions in a variety of nonpublic,  
20 private-equity, and hedge funds; and advisory and back-office  
21 service provided to third parties. It is the monetization of  
22 those assets that will provide the basis for the restructuring  
23 of this debtor. And Judge Jernigan's prior experience with the  
24 small sliver of what the debtor's business currently is, will  
25 be only marginally relevant, at all.



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1           Acis didn't have any other balance-sheet assets. They  
2           were basically an advisor of CLOs.

3           For example, Judge Jernigan has no experience or  
4           knowledge surrounding the debtor's multi-strat. fund; its  
5           Korean, Latin American, or Singapore private-equity  
6           investments; its investments in the PetroCap funds; or the  
7           other myriad of assets that are on the debtor's balance sheet  
8           which Your Honor will likely will hear about in connection with  
9           the hearings that will go on later.

10           The committee and Acis make a big point of arguing  
11           that Judge Jernigan is familiar with the shared-service and  
12           management agreements between Acis and the debtor. However,  
13           there was a lot of testimony from the podium on that. The only  
14           testimony before Your Honor is that the contracts are  
15           different. Mr. Waterhouse wasn't even familiar with the  
16           contracts, couldn't provide any testimony. But Mr. Sharp  
17           testified that the type of shared-service and advisory  
18           agreements for CLOs are markedly different than the type of  
19           services and advisory agreements for non-CLO entities. While  
20           Acis' Counsel stood up there and said there's a template and  
21           they're pretty much the same, that was purely argument. There  
22           was no evidence in the record to reflect that.

23           And in fact, the only two agreements that involved  
24           Highland in the Acis case were these two agreements. But  
25           again, they're like apples and oranges.

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1 In any event, Your Honor, one of the matters that Mr.  
2 Sharp is focusing on will be the appropriate economic  
3 arrangement between the debtor and its affiliates and  
4 nonaffiliates, through its shared-services and advisory  
5 agreements. That has been a focus of DSI's analysis. The  
6 committee has indicated that's something that they want to  
7 focus on. And Mr. Sharp will come up with a recommendation as  
8 to what those should be, and it'll be that recommendation  
9 that'll be based on the market rate for these contracts in  
10 these particular businesses that will be relevant for Your  
11 Honor to consider, at some point.

12 They attached a post-confirmation opinion that Judge  
13 Jernigan issued with respect to denial of a motion to seek  
14 arbitration regarding provisions of those agreements. But if  
15 you read that opinion carefully, you will see that the primary  
16 issues in that case were whether an arbitration provision  
17 actually survived, given that the last version of the agreement  
18 did not have them -- there were five different iterations in  
19 each of the agreements. And after concluding that the  
20 arbitration provision did survive, she ultimately ruled that  
21 that notwithstanding, she would not enforce arbitration because  
22 the claims were too related to the other claims that were being  
23 asserted. Again, nothing to do with the debtor's business.

24 In fact, Your Honor, after today, I have no doubt that  
25 Your Honor will be a lot more familiar -- if Your Honor is not

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1 already -- with what the debtor does. So Your Honor will hear  
2 testimony from Mr. Caruso; Your Honor will hear testimony from  
3 Mr. Sharp, about various aspects of the debtor's business, what  
4 it's doing, its management structure, how that structure is  
5 working. All that you will hear, which will put you in an  
6 advanced state, compared to Judge Jernigan, as opposed to being  
7 behind.

8 And there are other aspects of this case that are on  
9 the way that have nothing to do with Acis. For example, we  
10 just filed a motion to approve ordinary-course bonuses to  
11 employees. And we may also seek approval of a KERP and a KEIP.  
12 Acis had their own employees, and Judge Jernigan had no special  
13 knowledge of the debtor that would put her in a better position  
14 to give her an advantage over this Court in determining an  
15 appropriate compensation structure.

16 It isn't that difficult. Your Honor hears it all the  
17 time: KEIPs, KERPs. Judge Jernigan hears it all the time. My  
18 point is, Your Honor, there's nothing that would help her, from  
19 her knowledge of Acis, that would justify a transfer of venue.

20 They also stress that -- in their papers, that Judge  
21 Jernigan heard a lot of testimony from debtor's management.  
22 But they really don't discuss what the content of that  
23 testimony is or how it's, in any event, relevant to this case.  
24 They just really want to rely on the sheer volume of  
25 information that they have foisted on Your Honor, citing to the

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1 entire record, by saying there's so much; there's been hundreds  
2 of pages, dozens of hearings, and then that means Judge  
3 Jernigan is in a much better position.

4 If they wanted to point to specific things in the  
5 record where the judge had specific knowledge, they could have.  
6 They shouldn't (sic) have. And they're trying to do this on a  
7 big holistic view, but when Your Honor looks at the record, I  
8 think Your Honor will conclude otherwise.

9 In any event, it's not really -- they don't explain  
10 why familiarity with the debtor's management is at all  
11 relevant. Look, they clearly want a trustee in this case and  
12 believe that because Judge Jernigan found debtor's management  
13 to not be credible, she'll be more apt to appoint a trustee  
14 than this Court. But that argument doesn't withstand scrutiny.

15 This case is different. This case is being managed by  
16 a CRO. This case had the debtor file a motion it didn't have  
17 to file for ordinary-course protocols. This case has -- thus  
18 far, you haven't heard anything about any discovery disputes,  
19 you haven't heard anything -- although you heard a couple weeks  
20 ago there might be issues with cooperation, we provided a  
21 substantial amount of documents, produced witnesses, in a  
22 significantly accelerated time frame. You have heard nothing  
23 about that.

24 So any un-cooperation or difficulty of any -- that  
25 they may have encountered in the Acis case, there's no evidence

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1 that that's occurring here, for good reason; because Mr. Sharp  
2 is in charge. And although he is still reporting to Mr.  
3 Dondero, as his corporate structure, Mr. Dondero can terminate  
4 him, and if he terminates him, he has to give notice. That's  
5 appropriate. That's one of the issues we address in connection  
6 with the U.S. Trustee's concerns with the CRO motion. In order  
7 to file a corporate governance, he has to report. But there  
8 are certain things, as you'll hear later, that he has been  
9 given primary responsibility for.

10 Your Honor, Chapter 11 is about giving a debtor a  
11 fresh start, and this court is no -- this case is no exception.  
12 This Court is fully capable of evaluating the veracity of the  
13 debtor's witnesses; and transferring the case to Judge  
14 Jernigan, when the real motivation is because of how she has  
15 dealt with the prior case -- which they may not say it, but  
16 that's clearly what's happening here -- would be unduly  
17 prejudicial to the debtor.

18 We have nothing against Judge Jernigan. She is a fine  
19 jurist. But in this case I think it's a challenge and there's  
20 a reason why we decided to have the case filed here.

21 And then I'll also point to Your Honor the significant  
22 adversity between the two estates. Your Honor mentioned that.  
23 Counsel said, well, it happens in all cases. True. We've been  
24 involved in many, many cases with multi debtors, that they have  
25 issues in intercompany claims. That's a fact of modern

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1 corporate life.

2 But this is different. The whole -- one of the -- the  
3 most significant asset of Acis are their claims against this  
4 debtor. How those claims are prosecuted and when they succeed,  
5 may make or break the Acis case as to whether unsecured  
6 creditors get paid or not.

7 In a case like this, this factor does not support a  
8 transfer of venue; we argue that it supports keeping the case  
9 before Your Honor so that it can maintain the separateness of  
10 the estates.

11 In conclusion, Your Honor, we don't believe the  
12 committee has come close to satisfying its burden that a change  
13 of venue is appropriate under 1412. And as I mentioned at the  
14 beginning of my presentation, the committee's motive in  
15 bringing the motion and Acis' motive in joining the motion is  
16 clear. Even though the debtor has installed a CRO with  
17 expanded powers, with impeccable credentials to address  
18 creditor concerns, the committee and Acis are focused on the  
19 appointment of a Chapter 11 trustee and believe the transfer of  
20 the case to Texas is the most likely to get that goal  
21 accomplished.

22 But rather than filing the case -- or filing a trustee  
23 motion here, they took their shot on a venue motion and hope  
24 that Your Honor will give them a shot to do it in Texas.

25 Your Honor, for those reasons, we respectfully request

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1 that Your Honor deny the motion.

2 THE COURT: Thank you.

3 MR. POMERANTZ: Does Your Honor have any more  
4 questions?

5 THE COURT: No.

6 MR. POMERANTZ: Thank you, Your Honor.

7 THE COURT: Reply?

8 MR. CLEMENTE: Briefly, Your Honor. I will be brief.  
9 It will be a little less organized, because I'll just run  
10 through some points very quickly.

11 THE COURT: Okay.

12 MR. CLEMENTE: First of all, on Restaurant  
13 Acquisitions, I believe in that opinion, Your Honor, there were  
14 creditors that supported venue in Delaware. We do not have a  
15 single creditor on the record supporting Delaware -- excuse  
16 me -- supporting venue in Delaware.

17 Regarding the litigation in New York and Delaware,  
18 that's a red herring, Your Honor. They're forced creditors.  
19 They were forced to bring lawsuits to achieve their view of  
20 justice. It's not relevant to whether -- the location of  
21 that -- those lawsuits being in Delaware and New York. They  
22 were forced to bring those lawsuits in order to get paid by Mr.  
23 Dondero and the debtor.

24 Your Honor, we didn't call witnesses this morning,  
25 because we believe -- as I mentioned in my argument -- that the

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1 uncontroverted facts support our venue-transfer motion. The  
2 other motions are their burden, Your Honor. And so I wanted to  
3 remind Your Honor of that.

4 Regarding Young Conaway, obviously, we shouldn't -- it  
5 shouldn't be held against us that we decided that the smart and  
6 prudent thing to do is to have able Co-Counsel advise us as we  
7 proceed in front of Your Honor. So I believe that that's  
8 something that simply is of no moment.

9 The location of the assets, Your Honor, these are  
10 financial instruments. They're interests in limited  
11 partnerships. They're documents. They're things that are  
12 created by documents. And again, it's not controverted.  
13 That's all located in Dallas, Your Honor.

14 So this idea of far-flung assets throughout the  
15 country just simply isn't true. These are documents. They're  
16 interests. They're things that exist on paper.

17 Your Honor, we have not made this about the mom-and-  
18 pop creditors. We take Your Honor's comments to heart on that.  
19 As Counsel for Acis suggested, this is about the large body of  
20 unsecured creditors that are sitting at the bottom of this cap  
21 structure with oversecured creditors on top of it. And this  
22 large body of unsecured creditors has said we believe that  
23 venue is appropriate in Dallas.

24 Regarding the rules of evidence, of course Judge  
25 Jernigan is not going to ignore the rules of evidence. But



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1 we're talking about judicial efficiency.

2 For example, when I need to look at an indenture, I  
3 know in article 2 it's going to have payment terms. That's the  
4 type of thing that we're talking about, Your Honor; not that  
5 she's going to pre-judge or ignore the rules of evidence as she  
6 makes her determinations.

7 Finally, Your Honor, two things that I would -- that I  
8 would like to say. The testimony you may hear this afternoon,  
9 obviously that should not factor into what you're up the  
10 learning curve today, right now, in terms of considering the  
11 venue motion. That would put the cart before the horse, I  
12 think.

13 And, Your Honor, I'd be remiss if I didn't talk about  
14 this ordinary-course motion that we keep hearing about. If  
15 they didn't need it, they shouldn't have filed it. But  
16 instead, what they're trying to do is create some type of  
17 transparency and legitimacy around transactions that I think  
18 we'll make clear, are not in the ordinary course.

19 And the final point that I would make there, Your  
20 Honor; it's interesting Mr. Pomerantz referred to the multi-  
21 strategy transaction. That one is -- Your Honor, I will  
22 call -- a doozy. And you will hear more about it this  
23 afternoon, to the extent Your Honor decides not (sic) to keep  
24 venue.

25 With that, unless you have questions for me, I'll sit

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1 down.

2 THE COURT: No questions.

3 MR. CLEMENTE: Thank you.

4 THE COURT: Thank you.

5 MS. PATEL: Your Honor, I'll be brief, and I won't  
6 repeat anything that Mr. Clemente, on behalf of the committee,  
7 said. But I did want to just address kind of the first point  
8 Mr. Pomerantz made with respect to Judge Hale, and he's not  
9 aware of any formal statement that Judge Hale is not taking  
10 cases. Your Honor, that's accurate. I'm not aware of any  
11 formal statement that Judge Hale is not taking cases either.

12 So to answer Your Honor's question, in terms of random  
13 assignment, in the Northern District of Texas, where I have  
14 practiced my entire career, and primarily practice before the  
15 courts that are there -- and I'm a former law clerk to Judge  
16 Hale also -- I will say that although there may be a random  
17 assignment, it is not -- absolutely not unheard of that when  
18 you've got the matter -- for example, if a case were assigned  
19 to Judge Hale, but Judge Houser were to hear first-day matters  
20 and other significant matters, that Judge Hale would then  
21 transfer that case for judicial efficiency and economy within  
22 the district, to Judge Houser for further proceedings.

23 In other words, the Northern District of Texas always  
24 finds the easiest way in which to handle matters. And I am  
25 confident, Your Honor, that if this matter were transferred to

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1 the Northern District of Texas, that despite whoever it would  
2 be assigned to, that everyone is well aware of the time that  
3 Judge Jernigan has spent becoming familiar with Highland, these  
4 issues, and the amount of court resources that have been  
5 expended, such that this case would be transferred to Judge  
6 Jernigan.

7 But perhaps that's just a question for Judge Jernigan  
8 and her courtroom staff or the Northern District of Texas and  
9 the courtroom -- I'm sorry -- the court clerk or the staff  
10 that's there.

11 Your Honor, one last very quick point. The comment  
12 was made that -- with respect to CLOs that Highland hasn't had  
13 a new CLO since 2009. That, Your Honor, is because every new  
14 CLO that was issued from 2009 going forward to 2017, every one  
15 of those was issued in Acis. Acis was the structured-credit  
16 arm of Highland. It is how it issued new CLOs.

17 Indeed, it issued seven CLOs under Acis, with over two  
18 billion dollars in assets under management. The fact that  
19 there have been no new CLOs since then, simply means that they  
20 haven't been able to get one off the ground.

21 But make no mistake, Your Honor, the CLO business is  
22 valuable enough that it is now the subject of significant  
23 litigation because of all of the attempts to transfer those CLO  
24 assets away. So in terms of the court's familiarity, I would  
25 submit, again, that the bankruptcy court is clearly more

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1 familiar with a significant piece of Highland's business.

2 One last thing, Your Honor, and somewhat similar to  
3 that, that Judge Jernigan was not familiar with the Korean  
4 entities, the Singapore entities, or the multi-strat. I submit  
5 to Your Honor that this Court hasn't been exposed to those  
6 things as well, other than conclusory statements that well,  
7 we've got some Korean assets; oh, we've got some Singapore  
8 assets; and we've got multi-strat; and other than Mr.  
9 Waterhouse's, like, five-minute testimony at the first-day  
10 hearing where I was questioning him with respect to the assets  
11 which he didn't really quite know about what's inside a  
12 multi-strat.

13 Other than that, this Court hasn't been exposed either  
14 to those assets, so when we're looking at the broad playing  
15 field rather than looking at specific assets, there is a  
16 learning curve. Judge Jernigan is further along it with  
17 respect to certain things. Otherwise both courts are similarly  
18 situated or neutral to each other. But it's those assets that  
19 she is familiar with, the business model of Highland, and that  
20 further along the learning curve that she is, that's what's  
21 significant here, Your Honor.

22 And that will play into, clearly, what will ultimately  
23 be how Highland is going to restructure. Again, the creditors  
24 here have voted with their feet in filing this transfer motion.  
25 And these are the very same creditors, Your Honor, that will be

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1 necessary in order for this -- if it's going to be a successful  
2 restructure, they're the ones that are necessary to make it a  
3 successful restructure. Thank you.

4 THE COURT: You're welcome.

5 All right, let's break for lunch until 1:45. And when  
6 I come back at 1:45 -- when we come back at 1:45, I am going to  
7 issue an oral decision on this motion. All right.

8 (Recess at 12:39 p.m. until 1:47 p.m.)

9 THE CLERK: All rise.

10 THE COURT: Please be seated.

11 Okay, good afternoon. Thank you for coming back. I'm  
12 now prepared to rule on the motion to transfer venue, which I'm  
13 going to grant.

14 So I think, as I hinted at during argument, that the  
15 case law that we're kind of clinging to on motions to transfer  
16 venue, really do not reflect the modern reality of Chapter 11  
17 practice in the U.S. and internationally. And I think a lot of  
18 the parts of the test really don't reflect what's going on  
19 generally in Chapter 11 cases.

20 The thing I take greatest umbrage -- no, "umbrage"  
21 isn't the right word -- but disagree with the most is the idea  
22 that there's somehow a strong presumption of the debtor's  
23 choice of forum.

24 Look, every debtor that files bankruptcy -- certainly  
25 every sophisticated Chapter 11 debtor that files bankruptcy --

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1 is engaged in forum-shopping. There is an element to that.  
2 Where you file will depend on a lot of things that are unique  
3 to the forum.

4 I don't think you need to be ashamed of that. I don't  
5 think that's bad. As long as the venue you're choosing is  
6 appropriate under the law, certainly you're going to make  
7 decisions based on what the law is in that particular district,  
8 perhaps even a preference to individual judges or judge in that  
9 district.

10 To compound that with a strong presumption in favor of  
11 the debtor is to really give a boost to the debtor's choice of  
12 forum, which is made -- included in the decision-making process  
13 is an element of forum-shopping, to a level that makes it very  
14 difficult to overcome that presumption.

15 Of course, the creditors that file a motion to  
16 transfer venue are engaged in forum-shopping themselves.  
17 Otherwise, why would they be switching forums and going for a  
18 different location. Again, I don't think that the word "forum-  
19 shopping" should have the negative connotation that it has come  
20 to have in the law. It is the reality of bankruptcy practice.

21 Now, if that's involved -- if that goes a step further  
22 and somehow involves chicanery or something inappropriate just  
23 from an ethical standpoint, of course that's problematic. But  
24 there's absolutely no indication here whatsoever that anyone,  
25 on behalf of the debtor or the creditors or the Dallas court or

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1 the Delaware court, is doing anything other than acting  
2 appropriately.

3 The question about a motion to transfer venue is  
4 whether the motion should be granted by a preponderance of the  
5 evidence. If you add a strong presumption, you're turning it  
6 into a harder motion to be granted; and I don't think that's  
7 appropriate.

8 However, I find the laundry list of factors that are  
9 generally discussed to be irrelevant or almost irrelevant to  
10 the actual issues that are going on, particularly in a case  
11 like this. And I'll get to that in a second.

12 So six of the debtors are located in Texas; UBS is  
13 located in New York. UBS is located everywhere. Wells Fargo  
14 is located everywhere. Certainly companies have executive  
15 suites. But whether or not that should be the decision about  
16 where a case should file, to me, isn't particularly clear. It  
17 depends on the facts of the case.

18 I think a more general approach that would involve  
19 looking at the facts and circumstances of a case and seeing  
20 whether it points to a specific jurisdiction might be a more  
21 helpful way of proceeding. And that's what this case is really  
22 about.

23 This is a unique case, I think. It is a different  
24 case than those that we usually run into. And although maybe  
25 not completely different from every case, but in any event,

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1 this case is very focused on responding to existing litigation.  
2 And that existing litigation of a former affiliate, as of a few  
3 months ago, and a pending appeal that could make it a current  
4 affiliate, is located in the Northern District of Texas.

5 The judge in the Northern District of Texas has done a  
6 tremendous amount of work and has done -- issued a number of  
7 opinions, had a number of trials. That work creates a  
8 familiarity with the facts, issues, and players in a case  
9 which, while it may not affect the actual decision based on  
10 evidence on a motion-by-motion basis, certainly could color a  
11 judge's approach to a case.

12 Judges are human. Judges make judgments over time as  
13 to the parties, as to the lawyers. That's not inappropriate,  
14 as long as you stick by the rules of evidence. But it  
15 certainly can color what credibility you might give to a  
16 witness or to counsel.

17 I think here we have a situation where the real  
18 gravitas of this case is in Dallas. The two facts that really  
19 come out to me are, in this case, the fact that the executive  
20 suite is very focused and very Dallas-oriented. It's a global  
21 empire, but it's clearly focused in Dallas. And the existing  
22 litigation in the Acis bankruptcy that's been going on for some  
23 time; those are the two predominant factors.

24 Everything else kind of falls away. The creditors are  
25 scattered. The assets are scattered. The economic



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1 administration isn't being affected one way or the other. I  
2 mean, people can get on planes and you can go to Philly or you  
3 can go to Dallas. Either way, you're stuck on American  
4 Airlines. But so be it.

5 It can be done. And as a result, I think that the  
6 best solution here, to give the debtors a fair shot at  
7 reorganization, but to balance the creditors' rights and the  
8 creditors' desires, is to move the case to Texas.

9 And on that latter point, just to finish up. As I  
10 said with my previous decision in EFH, it was striking in that  
11 case that only one creditor moved to transfer venue and that  
12 none of the other creditors either actively opposed or simply  
13 stayed silent with regard to that motion, including significant  
14 creditors, like the official committee.

15 In this case, we have the opposite. We have the  
16 debtor defending its venue choice, of course. But there's a  
17 lot of silence, because there's no one else on that side. I  
18 thought it highly significant that Jefferies and -- is it  
19 Fortress?

20 UNIDENTIFIED SPEAKER: Frontier.

21 THE COURT: Frontier, thank you. That Jefferies and  
22 Frontier did not take a position. And no other creditors  
23 opposed the committee's motion. And the committee consists of  
24 a series of very large creditors.

25 So I think that given these facts and circumstances,

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1 particularly the unique nature of the ongoing litigation and  
2 the existing tie to Dallas, the executive suite and management,  
3 principal place of business, if you will, being focused in  
4 Dallas, and creditors -- as Counsel said -- voting with their  
5 feet to move the case to Dallas, and applying just a good old  
6 fashioned preponderance of the evidence standard, that the  
7 Court should grant the motion, which I will do.

8 Now, I need an order. And we will get the machinery  
9 in place, as soon as I get the order signed, to transfer the  
10 file as quickly as possible.

11 I did call Judge Jernigan prior -- right before I came  
12 out -- well, right before I went and got lunch and then came  
13 out -- to inform her what I was going to do, so the Dallas  
14 court is aware that this is -- that this is an issue that's  
15 coming their way.

16 Is there anything -- I'm not going to create a lot of  
17 law of the case for Judge Jernigan on matters that don't need  
18 to be decided today. Is there anything the parties actually  
19 agree on that needs to go forward today or can go forward  
20 today? If not, I'd rather just save everything for Judge  
21 Jernigan to have a fresh look at. I know that she did mention  
22 that she has availability on her calendar over the next several  
23 weeks. So you should be able to get on it rather quickly, once  
24 the case gets transferred.

25 We used to send big boxes in the mail to do this, but

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1 now it's just hitting a couple buttons on a computer to take  
2 care of that.

3 So is there anything we could -- we need to decide?

4 Okay. Just a question. Obviously there are estate  
5 professionals -- Pachulski not really a problem, since you'll  
6 stay in the case, but I'm thinking of Young Conaway -- and I  
7 don't know if there are any other firms that are Delaware firms  
8 that might fall out of the case that would be subject to the  
9 Court. But I'll leave that for Judge Jernigan to decide  
10 whether to retain them for a limited period of time or to pay  
11 them or not pay them. Hopefully, of course, they've earned  
12 their money; they should be paid.

13 Yes, sir.

14 MR. KHARASCH: Your Honor, Ira Kharasch of Pachulski.  
15 I think Your Honor, there is one vital matter that you should  
16 hear today and rule on. I would think it would be generally an  
17 easy motion. It is the application to employ the CRO. That is  
18 within the debtor's business judgment, given -- as we described  
19 the reasons for that, considering the concerns raised by  
20 creditors.

21 I think it's critical that the CRO be formally  
22 engaged. They've done a tremendous amount of work in the past  
23 six weeks. They've been at the company full time, for a team,  
24 for a month. They have done a lot of good stuff in this case.  
25 They have a lot more things to do.

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1 The CRO has been tasked under the modified -- under  
2 the protocols, with broadened authority to take all kinds of  
3 and accept all kinds of decision-making over key decisions of  
4 this case, involving insider transactions, ordinary-course  
5 transactions. We've done a lot of work modifying the protocols  
6 that relate to that.

7 This company is operating every day. I think the CRO  
8 and his team deserve some comfort that they should get employed  
9 as of today, Your Honor. I -- you know --

10 THE COURT: Let me hear from the committee.

11 MR. CLEMENTE: Thank you, Your Honor. Matthew  
12 Clemente on behalf of the committee.

13 Your Honor, we don't agree with that. Again, it's not  
14 about DSI being paid or not being paid. As Your Honor  
15 mentioned with Young Conaway, that isn't the issue. But to the  
16 extent Your Honor has any familiarity with the motions, they're  
17 all intertwined. The CRO is all part of the protocols that  
18 they're advancing in the ordinary-course motion.

19 So this isn't about simply retaining a professional to  
20 ensure that that professional gets paid. It really is about  
21 setting what I like to call concrete pillars in the ground in  
22 terms of how the debtor views the case should be managed going  
23 forward. And I think based on Your Honor's ruling, that's  
24 something that Judge Jernigan should be given the opportunity  
25 to weigh in on.

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1           So again, it's not about Mr. Sharp and his firm  
2 getting paid. I don't believe that that is the issue. They  
3 can continue doing what they've been doing, up to this point,  
4 just like we have, for example, at Sidley, and the rest of the  
5 professionals that haven't been retained. And I don't see why  
6 that should cause a problem.

7           But we do believe that that is integrated with the  
8 other suite of motions that would be before Your Honor; and we  
9 think it's appropriate for Judge Jernigan to make those  
10 decisions.

11           THE COURT: All right. Well, I don't view a retention  
12 application to be an emergent basis to hear a motion anyway.  
13 But I'm certainly not going to agree to sign it over objection  
14 of the committee, given how I just ruled. So --

15           MR. CLEMENTE: Thank you, Your Honor.

16           THE COURT: -- I'd also say. So I'd ask the committee  
17 Counsel to circulate a form of order and submit it under  
18 certification of counsel. I think the simpler the better; just  
19 for the reasons set forth on the record, and it's transferred.  
20 Don't put a lot of findings in there. That'll just cause  
21 trouble. That's my belief. But you can negotiate what you  
22 want to negotiate, and as soon as that's ready, upload it,  
23 inform chambers, we'll get it signed, and we'll start the  
24 machinery in place.

25           MR. CLEMENTE: Great. Thank you very much, Your

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1 Honor. We appreciate it.

2 THE COURT: All right. We're adjourned.

3 (Whereupon these proceedings were concluded at 2:02 PM)

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23	Transferring Venue of this Case to the		
24	United States Bankruptcy Court for the		
25	Northern District of Texas, granted.		

C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true  
and accurate record of the proceedings.



December 3, 2019

CLARA RUBIN

DATE

eScribers, LLC

352 Seventh Avenue, Suite #604

New York, NY 10001

(973) 406-2250

operations@escribers.net



**HIGHLAND CAPITAL MANAGEMENT, L.P.**  
**Case No. 19-12239(CSS)**

**December 2, 2019**

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<b>1:45 (3)</b> 105:5,6,6	<b>2018 (5)</b> 16:8,21;61:5; 65:16;74:4			
<b>1:47 (1)</b> 105:8	<b>2019 (4)</b> 13:18;60:20,21; 88:2			
<b>10:48 (1)</b> 41:8	<b>24 (2)</b> 37:11,21			
<b>100,000 (1)</b> 74:18	<b>25 (2)</b> 37:11,21			
<b>1014 (1)</b> 44:1	<b>26 (4)</b> 39:15;40:23; 59:17,25			
<b>11 (10)</b> 17:21;45:13; 78:23;80:3;86:24; 97:10;98:19;105:16, 19,25	<b>3</b>			
<b>11:05 (1)</b> 41:8	<b>3 (2)</b> 37:10,20			
<b>11:50 (1)</b> 75:8	<b>30 (1)</b> 15:21			
<b>12 (2)</b> 10:16;74:1	<b>30th (1)</b> 61:5			
<b>12:00 (1)</b> 75:8	<b>31st (1)</b> 60:20			
<b>12:39 (1)</b> 105:8	<b>4</b>			
<b>1408 (1)</b> 80:3	<b>45 (1)</b> 52:25			
<b>1412 (3)</b> 64:8;80:22;98:13	<b>5</b>			
<b>15th (1)</b> 60:21	<b>5.2 (1)</b> 16:1			
<b>17 (2)</b> 60:13;69:11	<b>7</b>			
<b>18 (2)</b> 37:9,20	<b>7 (1)</b> 13:18			
<b>1979 (2)</b> 81:3;87:25	<b>7.5 (1)</b> 15:3			
<b>1998 (1)</b> 81:15	<b>8</b>			
<b>2</b>	<b>807 (1)</b> 38:12			
<b>2 (5)</b> 38:17;60:8,11; 66:18;101:3	<b>9</b>			
<b>2,000 (4)</b> 51:24;53:3;67:18, 20	<b>9 (2)</b> 37:10,21			
<b>2:02 (1)</b> 114:3	<b>99.94 (1)</b> 80:7			
<b>2006 (3)</b> 24:10;29:7,8				
<b>2009 (3)</b> 92:13;103:13,14				

## EXHIBIT 23



IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

In Re: ) **Case No. 19-34054-sgj-11**  
) Chapter 11  
)   
HIGHLAND CAPITAL ) Dallas, Texas  
MANAGEMENT, L.P., ) January 9, 2020  
) 9:30 a.m. Docket  
Debtor. )   
) DEBTOR'S MOTION TO COMPROMISE  
) CONTROVERSY WITH OFFICIAL  
) COMMITTEE OF UNSECURED  
) CREDITORS [281]

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Debtor: Jeffrey N. Pomerantz  
PACHULSKI STANG ZIEHL & JONES, LLP  
10100 Santa Monica Blvd.,  
13th Floor  
Los Angeles, CA 90067-4003  
(310) 277-6910

For the Debtors: Ira D. Kharasch  
PACHULSKI STANG ZIEHL & JONES, LLP  
10100 Santa Monica Blvd.,  
13th Floor  
Los Angeles, CA 90067-4003  
(310) 277-6910

For the Debtor: John A. Morris  
PACHULSKI STANG ZIEHL & JONES, LLP  
780 Third Avenue, 34th Floor  
New York, NY 10017-2024  
(212) 561-7700

For the Debtors: Melissa S. Hayward  
Zachery Z. Annable  
HAYWARD & ASSOCIATES, PLLC  
10501 N. Central Expressway,  
Suite 106  
Dallas, TX 75231  
(972) 755-7104

1 APPEARANCES, cont'd.

2 For the Official Committee Matthew A. Clemente  
3 of Unsecured Creditors: Dennis M. Twomey  
4 SIDLEY AUSTIN, LLP  
5 One South Dearborn Street  
6 Chicago, IL 60603  
7 (312) 853-7539

8 For the Official Committee Penny P. Reid  
9 of Unsecured Creditors: SIDLEY AUSTIN, LLP  
10 2021 McKinney Avenue, Suite 2000  
11 Dallas, TX 75201  
12 (214) 981-3413

13 For the Issuer Group: James T. Bentley  
14 (Telephonic) SCHULTE ROTH & ZABEL, LLP  
15 919 Third Avenue  
16 New York, NY 10022  
17 (212) 756-2000

18 For the Issuer Group: James E. Bain  
19 (Telephonic) JONES WALKER, LLP  
20 811 Main Street, Suite 2900  
21 Houston, TX 77002  
22 (713) 437-1820

23 For Acis Capital Rakhee V. Patel  
24 Management GP, LLC: Annmarie Antoinette Chiarello  
25 WINSTEAD, P.C.  
2728 N. Harwood Street, Suite 500  
Dallas, TX 75201  
(214) 745-5250

26 For Redeemer Committee of Terri L. Mascherin  
27 the Highland Crusader JENNER & BLOCK, LLP  
28 Fund: 353 N. Clark Street  
29 (Telephonic) Chicago, IL 60654-3456  
30 (312) 923-2799

31 For Redeemer Committee of Mark B. Hankin  
32 the Highland Crusader JENNER & BLOCK, LLP  
33 Fund: 919 Third Avenue  
34 (Telephonic) New York, NY 10022-3098  
35 (212) 891-1600



3

1 APPEARANCES, cont'd.:

2 For the U.S. Trustee: Lisa L. Lambert  
3 Meredyth A. Kippes  
4 OFFICE OF THE UNITED STATES  
5 TRUSTEE  
6 1100 Commerce Street, Room 976  
7 Dallas, TX 75242  
8 (214) 767-8967

6 For Jefferies, LLC: Patrick C. Maxcy  
7 (Telephonic) DENTONS US, LLP  
8 233 South Wacker Drive, Suite 5900  
9 Chicago, IL 60606-6361  
10 (312) 876-8000

9 For Patrick Daugherty, Patrick Daugherty  
10 Pro Se:

11 Recorded by: Hawaii S. Jeng  
12 UNITED STATES BANKRUPTCY COURT  
13 1100 Commerce Street, 12th Floor  
14 Dallas, TX 75242  
15 (214) 753-2006

16 Transcribed by: Kathy Rehling  
17 311 Paradise Cove  
18 Shady Shores, TX 76208  
19 (972) 786-3063

20

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1 DALLAS, TEXAS - JANUARY 9, 2020 - 9:56 A.M.

2 THE COURT: All right. Let's roll to Highland now.  
3 Let's get appearances from lawyers in the courtroom, please.

4 MR. POMERANTZ: Good morning, Your Honor. Jeff  
5 Pomerantz; Pachulski Stang Ziehl & Jones. Happy New Year,  
6 Your Honor.

7 THE COURT: Happy New Year.

8 MR. POMERANTZ: Here on behalf of the Debtor.

9 THE COURT: Okay. Thank you.

10 MS. HAYWARD: Good morning, Your Honor. Melissa  
11 Hayward and Zachery Annable on behalf of the Debtor.

12 THE COURT: Good morning.

13 MS. LAMBERT: Lisa Lambert, and I think Ms. Kippes  
14 will be joining me, representing William Neary, the United  
15 States Trustee.

16 THE COURT: Thank you.

17 MS. CHIARELLO: Good morning, Your Honor. Annmarie  
18 Chiarello and Rakhee Patel here on behalf of Acis Capital  
19 Management, LP and Acis Capital Management GP, LLC.

20 THE COURT: Thank you.

21 MR. CLEMENTE: Good morning, Your Honor. Matthew  
22 Clemente from Sidley Austin on behalf of the Official  
23 Committee of Unsecured Creditors. With me today are my  
24 partners Dennis Twomey and Penny Reid.

25 THE COURT: Okay. Good morning. All right. Is that

1 all of the courtroom appearances?

2 All right. We have several people on the phone. I think  
3 most of them are just listening in. If you're on the phone,  
4 though, and you wish to appear, you may do so at this time.

5 MR. BENTLEY: Good morning, Your Honor. This is  
6 James Bentley of Schulte Roth & Zabel. Also on the line is my  
7 co-counsel, Joseph Bain of Jones Walker. We represent the  
8 Issuers.

9 THE COURT: Okay. Good morning.

10 MS. MASCHERIN: Good morning, Your Honor. This is --

11 MR. MAXCY: Good morning. Patrick --

12 MS. MASCHERIN: Good morning, Your Honor. This is  
13 Terri Mascherin of Jenner & Block. Also on the line with me  
14 is my partner, Mark Hankin. We represent the Redeemer  
15 Committee of the Highland Crusader Fund, which is one of the  
16 members of the Unsecured Creditors' Committee.

17 THE COURT: Okay. Good morning.

18 MR. MAXCY: Good morning, Your Honor. This is  
19 Patrick Maxcy from Dentons US, LLP on behalf of Jefferies,  
20 LLC.

21 THE COURT: Okay. Thank you. All right. Well, I  
22 guess that is it for the phone appearances.

23 Mr. Pomerantz, we're -- we have just one matter on the  
24 calendar, the motion to compromise with the Committee. I saw  
25 two limited objections, and then a U.S. Trustee's broader

1 objection. I'll start with, Do you have any of these  
2 objections worked out?

3 MR. POMERANTZ: Yes, we do.

4 THE COURT: Okay.

5 MR. POMERANTZ: We believe we have the Jefferies  
6 objection worked out, as well as the objection of the Issuers.  
7 And I'll, during the course of my presentation, alert Your  
8 Honor to how that's worked out.

9 THE COURT: Okay.

10 MR. POMERANTZ: And then we'll have a revised order  
11 that basically addresses each of their concerns, or at least  
12 Jefferies' concerns, but the statements on the record for the  
13 Issuers' concerns.

14 THE COURT: Okay. Very good.

15 MR. POMERANTZ: Good morning again, Your Honor. Jeff  
16 Pomerantz; Pachulski, Stang, Ziehl & Jones. I'm joined in the  
17 courtroom by Ira Kharasch, Greg Demo, and John Morris from my  
18 office. I would also like to introduce the Court to the  
19 proposed new members of the board of directors of Strand  
20 Advisors, which is the Debtor's general partner. They're all  
21 sitting in the first row behind counsel's well. And that's  
22 Mr. James Seery, --

23 THE COURT: Good morning.

24 MR. POMERANTZ: -- Mr. John Dubel, --

25 THE COURT: Good morning.

7

1 MR. POMERANTZ: -- and the Honorable Russell Nelms.

2 THE COURT: Yes. I've met him before.

3 MR. POMERANTZ: As have we. We thought you would  
4 remember him.

5 The resumes of Mr. Seery and Mr. Dubel were attached to  
6 the motion filed on December 27th, and those two resumes and  
7 the resume of the Honorable Judge Nelms were attached to the  
8 reply that was filed last evening. And while Mr. Seery and  
9 Mr. Dubel may be new names to Your Honor, we know that you are  
10 familiar with Judge Nelms, who sat with you in this district.

11 THE COURT: Uh-huh.

12 MR. POMERANTZ: Also in the courtroom, Your Honor, is  
13 Brad Sharp, the Debtor's chief restructuring officer from DSI,  
14 --

15 THE COURT: Good morning.

16 MR. POMERANTZ: -- and his colleague, Fred Caruso,  
17 who spends most of his working hours at the Debtor's Dallas  
18 headquarters.

19 THE COURT: Good morning.

20 MR. POMERANTZ: We have the declaration of Mr. Sharp  
21 that we would move into evidence at this point in time.

22 THE COURT: All right. I've got a stack of paper.  
23 If you have an extra copy for me to use, --

24 MS. HAYWARD: Your Honor, may I approach with the --

25 THE COURT: You may.

1 MS. HAYWARD: Your Honor, it was filed, the  
2 declaration was filed. I'm not sure that we have a copy of --

3 MR. POMERANTZ: Your Honor, we will also at the  
4 appropriate time during my presentation, I'll bring up to Your  
5 -- ask to bring up to Your Honor revisions to the term sheet  
6 that was attached to the motion.

7 THE COURT: Okay.

8 MR. POMERANTZ: Copies have been given to Ms. Lambert  
9 as well as the Committee.

10 THE COURT: Okay. Very good. All right. Well, what  
11 was handed to me was the preliminary term sheet as well as the  
12 CVs for the proposed new board members. I don't see the  
13 declaration --

14 MR. POMERANTZ: Your Honor, if I may approach, I have  
15 a copy.

16 THE COURT: You may. All right. Very good.

17 MR. POMERANTZ: So we would move that declaration  
18 into evidence.

19 THE COURT: All right. The Court will admit this.  
20 It was filed on the docket at 327, but I will additionally  
21 admit it as Exhibit 1 today.

22 (Debtor's Exhibit 1 is received into evidence.)

23 THE COURT: At some point in time, I want to give  
24 parties the opportunity to cross-examine Mr. Sharp. Do you  
25 want to do that now, or shall we hear an opening statement?

1 MR. POMERANTZ: However Your Honor prefers. I mean,  
2 maybe it's helpful to hear argument first, and then, before  
3 the Trustee --

4 THE COURT: I think I'd like to hear opening  
5 statements and then we'll --

6 MR. POMERANTZ: Thank you.

7 THE COURT: -- make the opportunity available. Okay.

8 OPENING STATEMENT ON BEHALF OF THE DEBTOR

9 MR. POMERANTZ: Your Honor, by way of background, we  
10 appeared before Your Honor on December 6th and December 19th.  
11 And during each of those hearings, we described for the Court  
12 negotiations that were underway between the Committee and the  
13 Debtor which, if successful, would have -- would eliminate the  
14 need for contested and uncertain and costly litigation  
15 regarding the appointment of a Chapter 11 trustee and really  
16 put this case in a position where the Debtor and the Committee  
17 would be able to work together constructively towards  
18 negotiation of a plan.

19 As a result of our hearing on December 19th, Your Honor  
20 entered a scheduling order that set deadlines for either the  
21 filing of a motion to approve a settlement, or alternatively,  
22 the filing of one or more motions for the appointment of a  
23 trustee.

24 As set forth and required by the scheduling order, we  
25 filed our motion on December 27th, and in that motion we

1 sought approval of a term sheet and ancillary documents  
2 between the Debtor and the Committee, which I'll describe  
3 shortly.

4 While a couple of items had not yet been agreed to at the  
5 time the motion was filed, I'm pleased to report that over the  
6 last couple of days we've been able to reach closure with the  
7 Committee with respect to those items, and there would also be  
8 some modifications to the term sheet, which I'll go through in  
9 a few moments.

10 The motion, Your Honor, seeks approval of the term sheet,  
11 which accomplishes a variety of things that, again, will allow  
12 the Debtor and the Committee to put the acrimony that has  
13 existed in this case for the first three months behind us and  
14 allow us to focus on productive matters. In the last 24  
15 hours, as I mentioned, there have been a few changes to the  
16 term sheet that I will describe. And I would like to hand up  
17 Your Honor a redline and a clean copy of the revised term  
18 sheet and exhibits. May I approach?

19 THE COURT: All right. You may. Do you have an  
20 extra for the law clerk? Okay. Thank you.

21 (Pause.)

22 MR. POMERANTZ: Your Honor, the term sheet does a  
23 number of things. Would you like me to give Your Honor some  
24 time to look through the redlines?

25 THE COURT: No. You may proceed.



1 MR. POMERANTZ: Okay. The term sheet does a number  
2 of things. The first thing the term sheet does is appointment  
3 of an independent board at Strand Advisors. Strand Advisors  
4 is the GP of the Debtor. The Debtor is an LP. The Debtor  
5 previously had filed a motion to approve the retention of Brad  
6 Sharp as the chief restructuring officer, and that initial  
7 agreement and motion contain details regarding the scope of  
8 Mr. Sharp's authority and the scope of what the Debtor could  
9 do without Mr. Sharp's prior consent.

10 The Committee raised concerns that the structure was not  
11 sufficient to ensure that decisions were being made for the  
12 Debtor only in their best interests and without any  
13 inappropriate influence from Mr. Dondero.

14 To address the Committee's concerns, a focal point of the  
15 settlement was the Debtor's agreement to appoint an  
16 independent board of directors at Strand who would be  
17 responsible for managing the operations of the Debtor.

18 Over the last few weeks, a principal aspect of the  
19 negotiations between the Committee and the Debtor have been  
20 discussing who should the independent directors be.  
21 Conceptually, the Debtor and the Committee both agreed that  
22 the board should include, first, a person with significant  
23 industry experience in which the Debtor operates -- hedge  
24 funds, money management; second, a person with deep  
25 restructuring experience from the financial advisor side; and

1 third, a person with some sort of judicial or governmental  
2 experience.

3 The Debtor originally provided the Committee with three  
4 proposed candidates. The Committee considered the Debtor's  
5 request, but instead presented the Debtor with four different  
6 candidates and asked the Debtor to choose from those four.  
7 The Debtors interviewed each of those people and ultimately  
8 agreed on Messrs. Dubel and Seery, who were each on the  
9 original list.

10 As of the deadline to file the motion on December 27th,  
11 the Committee and the Debtor had still not agreed on the  
12 identity of the third board member, but the parties were  
13 hopeful that an agreement could ultimately be reached and we  
14 decided to go ahead and file the motion. As I'm sure Your  
15 Honor saw in the motion, it was contingent upon everyone  
16 agreeing on the third board member.

17 Ultimately, the Debtor and the Committee both agreed that  
18 Mr. Dubel and Mr. Seery could identify the third board member  
19 out of a pool of four people: Two of the people originally  
20 requested by the Committee and two people identified by the  
21 Debtor. This week and over the weekend, Mr. Seery and Mr.  
22 Dubel interviewed each of the four candidates, and ultimately  
23 decided on the appointment of Judge Nelms as the third  
24 independent board member.

25 The board, as it will be constituted going forward, in the

1 Debtor's opinion, consists of three exceptional individuals  
2 who are independent of the Debtor, have a sterling reputation  
3 in the community, and bring to the Debtor a variety of the  
4 skills that we believe, and believe the Committee agrees,  
5 gives the Debtor the best opportunity to achieve a consensual  
6 restructuring and otherwise manage the affairs of the Debtor  
7 in the best interests of the stakeholders.

8 It is contemplated that the Debtor will continue to retain  
9 the services of DSI as the chief restructuring officer, and  
10 ultimately the board will determine if it's important to  
11 retain a CEO going forward.

12 The second thing that the term sheet does, Your Honor, was  
13 the removal of Mr. Dondero as an officer and director of  
14 Strand and eliminate all of his control over decision-making  
15 of the Debtor. The Debtor recognized early on in this case  
16 that Mr. Dondero's continuing role with the Debtor in a  
17 position of authority made the Committee extremely uneasy.  
18 Accordingly, the term sheet provides for him removing himself  
19 as an officer and director of Strand and that he would no  
20 longer be in a position of control at the Debtor.

21 However, since the filing of the motion, over the last  
22 several days, concerns have been raised about whether removing  
23 Mr. Dondero from the business entirely would have unintended  
24 consequences. I believe I may have mentioned at prior  
25 hearings that, because of his involvement as a portfolio

1 manager under various contracts with third parties, that there  
2 could be adverse economic consequences to the Debtor if he  
3 didn't stay in some role.

4 As a result of discussions over the last 24 hours, the  
5 Committee has agreed and the Debtor agreed to modify the term  
6 sheet to allow the new board to decide whether to retain Mr.  
7 Dondero in his capacity as a portfolio manager, provided,  
8 however, that he will not receive any compensation and he will  
9 agree to resign if requested by the board.

10 In any event, he will have no decision-making control at  
11 all and he will report to the independent board.

12 The corporate governance documents that create the new  
13 independent board of Strand also provide that Mr. Dondero, as  
14 the owner of the equity in Strand, may not replace the board  
15 without the Committee consent or court order.

16 The third major aspect of the term sheet, Your Honor, was  
17 the agreement on operating protocols, and it really relates to  
18 the ground rules for the Debtor's operations going forward and  
19 when notice to the Committee is required of certain  
20 transactions that would otherwise be in the ordinary course of  
21 business.

22 Importantly, Your Honor, we are not trying to modify the  
23 Bankruptcy Code in any way. Any transactions out of the  
24 ordinary course of business would still be subject to Your  
25 Honor's approval.

1           However, in this case, as we indicated in the initial  
2 motion we filed when the case was in Delaware, whether or not  
3 something is ordinary is not straightforward in a case such as  
4 the Debtor's, given the nature of the Debtor's operations. So  
5 we thought it was important to establish ground rules up  
6 front, and establishing those ground rules was one of the  
7 things we did initially in the case. We had opposition from  
8 the Committee, and we've worked through the opposition and  
9 ultimately arrived at the operating protocols that are  
10 attached to the term sheet.

11           They have been slightly modified in nonmaterial ways in  
12 the documents I handed up to Your Honor.

13           They were subject to substantial negotiations between the  
14 Debtor and the Committee, and we also expect them to be the  
15 subject of future discussions with the Committee and the  
16 independent board after the independent board takes -- takes  
17 place. Takes over.

18           Two parties in interest, Your Honor, Jefferies and a group  
19 of Issuers, the CLOs, have filed comments to the term sheet,  
20 which I'll describe in a few moments.

21           THE COURT: Okay.

22           MR. POMERANTZ: The next aspect, Your Honor, of the  
23 term sheet was the provision of standing to the Creditors'  
24 Committee to pursue certain insider claims.

25           During the negotiations, the Committee requested immediate

1 standing to investigate and potentially prosecute claims  
2 against insiders to the extent those insiders were not  
3 employed by the Debtor. Granting standing at this stage of  
4 the case was a difficult give by the Debtor. However, the  
5 Committee impressed upon the Debtor the importance of them  
6 being able to control the filing of any actions against the  
7 insiders, and the Debtor decided to accede to the Committee's  
8 request.

9 It still remains the Debtor's hope that, with the creation  
10 of the independent board, that the Debtor, the Committee, and  
11 any insiders who might be subject to any such claims will be  
12 able to come together and negotiate a consensual resolution of  
13 this case. While all parties, I'm sure, can and know how to  
14 litigate, hopefully they will agree that a negotiated outcome  
15 is better than a litigated outcome.

16 The next aspect of the term sheet, Your Honor, was the  
17 document preservation protocols, and it provides for certain  
18 procedures to be put in place to address the Committee's  
19 concerns about document preservation. They are contained in  
20 an exhibit to the term sheet. Again, slight nonmaterial  
21 modifications were made in what I handed up to Your Honor.  
22 And essentially they provide also for the Committee's access  
23 to privileged documents to aid in their investigation and  
24 prosecution of claims to which they are granted standing, and  
25 also sets forth a procedure to be followed to address concerns

1 if the information is subject to shared privileges by several  
2 entities.

3 As I mentioned, Your Honor, three parties have filed  
4 responses to the motion. The first is Jefferies. Jefferies  
5 is a secured creditor of the Debtor with respect to its margin  
6 account held at Jefferies, and also has a similar account held  
7 by a non-debtor affiliate. They have asked for clarification  
8 that, one, nothing in the protocols or the motion affects its  
9 rights under the underlying agreements or the safe harbor  
10 provisions of the Bankruptcy Code entitling them to enforce  
11 their remedies; and two, that the Debtors will not trade in  
12 the prime account without Jefferies' consent, and if that  
13 consent is sought and not obtained, only subject to court  
14 order.

15 The Debtor has agreed to include language in the order to  
16 address Jefferies' concern, and at the conclusion of my  
17 presentation I'll submit to Your Honor an order and a redline  
18 containing that language.

19 THE COURT: Okay.

20 MR. POMERANTZ: The second objection -- or not  
21 objection, Your Honor -- the second statement was filed by a  
22 group of Issuers of CLO obligations.

23 THE COURT: Uh-huh.

24 MR. POMERANTZ: And they were concerned that certain  
25 aspects of the operating protocols which require notice to the

1 Committee prior to the Debtor being able to take certain  
2 actions could conflict with the provisions of the underlying  
3 agreements which might require the Debtor to take action on a  
4 more expedited basis.

5 Neither the Issuers or the Debtor are aware of any  
6 potential transactions that will arise prior to the next  
7 hearing before Your Honor on January 21st. We understand --  
8 we were not party to these discussions between the Committee  
9 and the Issuers yesterday, but we understand the way it's been  
10 resolved is that the Issuers will withdraw their objection as  
11 it relates to going forward today, subject to being able to  
12 come back to the Court on the 21st and revisit the issue if  
13 additional changes are not made acceptable to them to resolve  
14 their issues and concerns.

15 THE COURT: Okay.

16 MR. POMERANTZ: But I think all parties acknowledge  
17 that over the next 12 days this is a theoretical issue rather  
18 than a practical issue.

19 THE COURT: Okay.

20 MR. POMERANTZ: This brings us, Your Honor, to the  
21 United States Trustee's opposition, which is really the only  
22 true objection to the motion that has been filed. No creditor  
23 has filed an objection, no investor has filed an objection,  
24 and no governmental agency -- which the U.S. Trustee in its  
25 objection purports to be pursuing their interests -- has filed



1 an objection, either.

2 As Your Honor probably recalls, at the December 19th  
3 hearing the Trustee indicated its intent to oppose any  
4 agreement between the Debtor and the Committee that would  
5 involve corporate governance and to file its own motion for  
6 the appointment of the trustee. That motion is currently  
7 scheduled for hearing on January 21st. We had asked the U.S.  
8 Trustee to reserve judgment on the Committee's and Debtor's  
9 agreement until after we had come to an agreement and after we  
10 had presented it to the Trustee, in hopes that it would  
11 address their concerns. However, as the Court told us -- as  
12 the U.S. Trustee told us and Your Honor at the December 19th  
13 hearing, there was nothing short of appointment of a trustee  
14 that would satisfy the Trustee.

15 The comments really didn't make sense to us, and I believe  
16 it perplexed Your Honor, but here we are.

17 At its core, Your Honor, the U.S. Trustee's objection is  
18 really a request that the Court substitute its business  
19 judgment for that of the Debtor and the Committee, the  
20 Committee who represents the substantial majority of all  
21 claims in this case, when both of them have decided that  
22 agreeing to certain changes in corporate governance, among  
23 other things, is preferable to the uncertain, costly, and  
24 time-consuming litigation over a trustee, and also the  
25 uncertainty, even if a trustee was appointed, on how the case

1 would be administered.

2 To the contrary, under the corporate governance proposal,  
3 we have three highly-qualified individuals who are poised to  
4 take over management of the Debtor, and each bring with them  
5 various skills that one trustee would not have.

6 The Trustee has filed its motion for appointment of a  
7 trustee, and I'm sure on the 21st will argue that the Code  
8 requires it. However, that's not the issue before Your Honor  
9 today. It's not whether a trustee is appropriate. It's  
10 whether the motion and the term sheet is a sound exercise of  
11 the Debtor's business judgment under Section 363, and,  
12 importantly, a reasonable compromise of the pending disputes  
13 between the Debtor and the Committee.

14 The Trustee's objection raises three general points, none  
15 of which have any merit. First, the Trustee argues that there  
16 is a lack of disclosure of significant matters. The first  
17 aspect that the Trustee raises to, or points to, is the  
18 absence of identification of the third board member and the  
19 absence of disclosure of the compensation that the board  
20 members will receive, which will be backstopped by the Debtor.

21 As I described before, Your Honor, the identity of the  
22 third member of the board was a fluid process which was only  
23 resolved earlier this week, and the Debtor did not believe  
24 that it was appropriate to reach agreement on director  
25 compensation until all board members could provide input.

1 Last night, we filed a reply to the Trustee's objection in  
2 which we disclosed the identity of the third board member, and  
3 we'll also disclose the proposed compensation to be provided  
4 to them, which essentially is as follows. Each member of the  
5 board will receive \$60,000 a month for the first three months  
6 of the case, \$50,000 a month for the next three months of the  
7 case, and the presumption thereafter would be \$30,000 a month.  
8 However, people recognize that this case will look a lot  
9 differently six months from now, and while the presumption is  
10 \$30,000, the Debtor, the independent board members, and the  
11 Committee will sit down, see how the case looks, and decide  
12 whether any modifications are appropriate.

13 The amount of compensation, which at first blush may seem  
14 significant, really reflects the significant amount of work  
15 that the Debtor, the Committee, and the independent directors  
16 anticipate will be required from them not only to get up to  
17 speed about the case, but to effectively manage this complex  
18 Debtor's business operations. The directors have heard from  
19 the Debtor and the Committee of all the issues, of all the  
20 concerns, and this is not an enviable task that they are  
21 undertaking. The compensation they are being provided thus  
22 far we believe is appropriate under the circumstances and  
23 commensurate with the work that they are going to be expected  
24 to complete.

25 If they are successful and they are able to achieve a

1 consensual restructuring here, the million and a half or so  
2 that will be spent on them will be best million and a half  
3 dollars I think spent in this case.

4 Your Honor, we also have updated corporate governance  
5 documents which --

6 (Pause.)

7 MR. POMERANTZ: Your Honor, may I approach with the  
8 updated corporate governance documents?

9 THE COURT: You may. Okay.

10 MR. POMERANTZ: As I will discuss in a moment, Your  
11 Honor, there is really no need for the Court to approve the  
12 corporate governance documents, as they have been executed by  
13 Strand, which is not a debtor before this Court. However,  
14 there are a couple of matters in those documents that I want  
15 to bring to the Court's attention that do impact on the  
16 Debtor.

17 THE COURT: Okay.

18 MR. POMERANTZ: First, as is typical for board  
19 members, Strand has agreed to indemnify the independent  
20 directors to the full extent permitted by law. The  
21 independent directors have requested that the Debtors backstop  
22 Strand's agreement, and the Debtor and the Committee agree,  
23 and the documents so provide.

24 Strand has also committed to obtain directors and officers  
25 coverage for the independent directors. It has been located,

1 it's in the process of being finalized and bound, and the  
2 Debtor will pay the cost of that coverage.

3 The independent directors have also asked for language in  
4 the order approving the settlement that requires a party  
5 seeking to assert a claim against the independent directors  
6 relating to their role as an independent director to  
7 demonstrate to this Court that a claim is colorable before  
8 filing the claim and providing the Court with jurisdiction  
9 over any such claim. This is language that's similar in other  
10 similar types of cases.

11 THE COURT: Uh-huh.

12 MR. POMERANTZ: That will be reflected in the order.

13 Next, the Trustee objects to the failure of the Debtor to  
14 identify who the potential chief executive officer of the  
15 Debtor will be. And essentially, she's arguing that you have  
16 to identify that CEO now; it has to be subject to court  
17 approval. However, there's no requirement that any company  
18 retain a CEO. It's not a corporate law requirement. And the  
19 fact that the board reserves the right to retain a CEO in the  
20 future is consistent with corporate law and is not a basis to  
21 deny the motion. And in any event, normally, the retention of  
22 a CEO is not a subject that is brought to the Court's  
23 attention for Court approval.

24 So the lack of any clarity over the identity of the CEO is  
25 a reflection of the fact that this independent board does not

1 know if a CEO is required. They will come in, they are going  
2 to interview all the employees, they're going to sit down with  
3 the CRO, they're going to sit down with counsel, they're going  
4 to sit down with the Committee, and ultimately they will  
5 decide if a CEO is to be retained. And if a CEO is to be  
6 retained, they will go through the process of identifying who  
7 that CEO is. But again, it's not a reason to deny the motion.

8 The Trustee has also argued that because the Committee is  
9 not granted standing to pursue claims against current  
10 employees, as opposed to former employees, that there might be  
11 some statute of limitations concerns with respect to claims  
12 against those employees. The argument doesn't really make  
13 sense to us. In the standard case, the Debtor retains causes  
14 of action. And the Committee can investigate causes of  
15 action. And at some point during the case, a Committee could  
16 come in and could demand that the Debtor prosecute them, and  
17 if the Debtor unreasonably refuses, could seek standing before  
18 the Court.

19 In this case, the Debtors agreed up front that the  
20 Committee has the standing to prosecute certain claims against  
21 insiders that are not employees of the Debtor, which obviates  
22 the need for standing. So we've gone one step more. But the  
23 Trustee is arguing that that leaves a void for the claims that  
24 are not subject to the agreement on standing.

25 However, the term sheet provides that the board is going

25

1 to make determinations on what employees should remain, what  
2 employees should not remain. To the extent the board  
3 terminates any employees and there are claims against them,  
4 then basically the Committee will have the ability to bring  
5 those claims.

6 To the extent that those people aren't terminated, we have  
7 no doubt that the Committee, in the course of its  
8 investigation, will determine whether claims should be brought  
9 against those people, and at some point in time may ask the  
10 Debtor to prosecute those claims or ultimately seek standing.

11 In any event, these things are not being swept under the  
12 rug. There's no real legitimate concern that there's any  
13 statute of limitations issue that will prevent those claims  
14 from being prosecuted.

15 I am very much aware and have no doubt that the Committee  
16 is going to be laser-focused on claims, and any concern that  
17 statute of limitations is going to lapse I think is not well-  
18 taken.

19 The Trustee next argues that the Court does not have the  
20 jurisdiction to implement the corporate governance matters,  
21 and for that reason the motion should be denied. They -- she  
22 argues that because Strand is not a debtor, that the Court has  
23 no authority to appoint --

24 MS. LAMBERT: Your Honor, I object. The United  
25 States Trustee is a he. I am not the United States Trustee,

1 and the attacks *ad hominem* are inappropriate.

2 THE COURT: All right. Well, clarification, the U.S.  
3 Trustee is the guy in Washington. But anyway, you may  
4 proceed.

5 MR. POMERANTZ: I apologize to Ms. Lambert.

6 MS. LAMBERT: Actually, he's downstairs right now.  
7 Bill Neary.

8 MR. POMERANTZ: I apologize to --

9 THE COURT: Oh, well, I thought you meant the big guy  
10 in Washington. But anyway, you may proceed.

11 MR. POMERANTZ: I apologize to Ms. Lambert and no  
12 offense was meant.

13 THE COURT: Okay.

14 MR. POMERANTZ: So, the U.S. Trustee argues that  
15 because Strand is not a debtor that the Court has no authority  
16 to appointment the independent directors and limit Mr.  
17 Dondero's right to remove the independent directors. The  
18 Debtor is not really seeking authority to appoint -- to have  
19 court authority for the appointment of the directors at  
20 Strand. Again, as I mentioned before, that authority exists  
21 outside of bankruptcy. Strand is not a debtor. Strand could  
22 appoint anyone it wants to carry out its responsibility as the  
23 general partner of the Debtor, and it's exercising its  
24 corporate authority to do so by installing a board at Strand.

25 Nor is the Debtor seeking court authority for Strand to



1 enter into the corporate governance documents. Other than the  
2 couple of items I mentioned before, Your Honor, Strand can  
3 enter into these documents without authority from this Court.  
4 The only court authority that was required: Debtor to  
5 backstop the indemnification obligations, Debtor to pay  
6 compensation to the board members, and Debtor to pay for the  
7 D&O policy.

8 With respect to the Court's right to limit Mr. Dondero's  
9 ability to terminate the independent directors, the term sheet  
10 contemplates the Court approving a stipulation which limits  
11 Mr. Dondero's ability to terminate the independent directors,  
12 and if he does in fact seek to terminate the appointment of  
13 the independent directors, he would be in violation of court  
14 order. But even more importantly, Your Honor, if he decided  
15 to terminate the independent directors without the Committee's  
16 consent and without the Debtor's consent, I wouldn't imagine  
17 it would take anyone very long to come back before Your Honor  
18 and ask Your Honor to very quickly appoint a trustee.

19 Accordingly, Your Honor, I think the argument of lack of  
20 jurisdiction over Strand is a red herring and should be  
21 denied.

22 Lastly, Your Honor, the Trustee makes a curious argument  
23 that a trustee is needed to protect all investors and  
24 governmental authorities. The Trustee argues that this case  
25 demands transparency which can only be accomplished by a

1 Chapter 11 trustee.

2 One thing I think the Debtor and the Committee and the  
3 U.S. Trustee will agree on, this case does demand  
4 transparency. And we believe we've installed a corporate  
5 governance structure, an operating protocol structure, a  
6 document preservation structure, that does just that, provides  
7 transparency that this Debtor has not been subject to and  
8 which is quite different from the case that was before Your  
9 Honor before.

10 So we believe that what the Debtor and the Committee have  
11 done is not only in the interests of the Debtor, the  
12 creditors, but investors and all governmental entities.

13 And no investor or governmental entity has had any  
14 concerns or any problems with what is being done. They  
15 haven't filed any objection. The U.S. Trustee apparently is  
16 proceeding by proxy asserting those interests.

17 Second, nothing in the term sheet or any of the documents  
18 limits the rights of investors or of governmental entities to  
19 seek a trustee, to seek documents, or to do anything they  
20 would -- that they would be entitled to do under the  
21 Bankruptcy Code.

22 In any event, Your Honor, the fact that the Trustee  
23 believes that a trustee is more appropriate, again, is an  
24 argument that they can make at the January 21st hearing. It's  
25 not a basis for denial of this motion.

1 In conclusion, Your Honor, the only economic stakeholders  
2 in this case believe that proceeding with the transactions  
3 contemplated by the term sheet is in the best interest of the  
4 estate, will maximize their ability to achieve a consensual  
5 restructuring, and move this case through the system as  
6 quickly and efficiently as possible. The term sheet is a  
7 valid exercise of the Debtor's business judgment under 363 and  
8 an appropriate compromise of controversy, and the Trustee's  
9 objections are really nothing more than a rehash of its  
10 request for an appointment of a trustee.

11 For all these reasons, Your Honor, we request that the  
12 Court overrule the U.S. Trustee's objection and approve the  
13 motion.

14 THE COURT: All right. Well, before I hear from our  
15 objectors, is there any friendly commentary? Mr. Clemente, I  
16 figured you might want to address this.

17 MR. CLEMENTE: I do, Your Honor. And good morning.

18 THE COURT: Good morning.

19 OPENING STATEMENT ON BEHALF OF THE OFFICIAL COMMITTEE OF  
20 UNSECURED CREDITORS

21 MR. CLEMENTE: For the record, Matthew Clemente from  
22 Sidley Austin on behalf of the Official committee of Unsecured  
23 Creditors. I do have some comments that I would like to make,  
24 Your Honor, some, so please bear with me. I will try and be  
25 brief.

1 THE COURT: Okay.

2 MR. CLEMENTE: I think as late as 1:00 o'clock in the  
3 morning I wasn't sure that I would be in front of you with  
4 this settlement fully in place in a manner that was  
5 satisfactory to my Committee. As I mentioned to you in my  
6 prior appearances in front of you, every provision was  
7 important to the Committee, and they all work together. As  
8 Your Honor can imagine, there was a lot of negotiation that  
9 took place, including late in the day and early morning, to  
10 come to that conclusion.

11 Some comments on our perspective as a committee, Your  
12 Honor. As an initial matter, we were absolutely not okay with  
13 the governance structure that was in place when the petition  
14 was filed. As we detailed in our objections to the CRO motion  
15 and the protocol motion back when the case was in Delaware,  
16 the Committee has very real and identifiable concerns about  
17 the Debtor's ability to dispatch its fiduciary duty. And the  
18 Committee very seriously contemplated moving for a Chapter 11  
19 trustee daily. That conversation is something that the  
20 Committee continues to -- continued to engage in, Your Honor.  
21 So it's something that they considered very, very carefully.

22 That was the lens through which the Committee was  
23 approaching negotiations over the settlement agreement and the  
24 independent director structure. That's how they viewed it.  
25 That's the backdrop against which they came to it.

1       The Committee had two primary goals that it had sought to  
2 achieve with the settlement agreement. The first was to  
3 ensure that Mr. Dondero does not remain in a position of  
4 management authority or control in any fashion with the  
5 Debtor. Goal number two was to ensure that the value of the  
6 Debtor's estate is preserved and maximized. Those two goals  
7 needed to work together.

8       The Committee believes that the carefully-crafted  
9 settlement agreement achieves these objectives in a manner  
10 that is more beneficial to the estate than a potential Chapter  
11 11 trustee and a related fight over its appointment at this  
12 time.

13       The lynchpin of the settlement, Your Honor, is the  
14 appointment of the three independent directors. And as Mr.  
15 Pomerantz outlined for you, that was the subject of intense  
16 discussion, negotiation, debate among the Committee and with  
17 the Debtor. But we believe that Mr. Seery, Mr. Dubel, and  
18 Judge Nelms are fully independent, highly qualified, and bring  
19 relevant and complementary skillsets to this board. Mr.  
20 Pomerantz referred to that, but we believe that the three  
21 directors all bring unique talents and attributes that will  
22 allow them to function effectively as a board and provide the  
23 appropriate oversight and direction that we believe is  
24 necessary here.

25       However, regardless of how independent or highly skilled

1 they may be, they would be of no use if they weren't bestowed  
2 with the appropriate power. So that was another point that  
3 was very important to the Committee, and we believe that the  
4 settlement does this. The settlement makes clear that the  
5 independent directors are granted exclusive control over the  
6 Debtor, including over all employees. That's absolutely  
7 critical to the Committee.

8 The settlement also provides that the CRO and the Debtor's  
9 professionals shall report and serve at the direction of the  
10 independent directors. That is also very important.

11 And let me be clear, Your Honor, because I think you may  
12 have raised this at a prior hearing: This is not a board that  
13 we expect to work at 50,000 feet, as demonstrated by the  
14 compensation structure that Mr. Pomerantz outlined for you.  
15 This will be a board that's hands-on, members of which will be  
16 on the ground, at the Debtor, with a strong presence and a  
17 clear message of who is in charge. That is critical for this  
18 Committee.

19 Additionally, as Mr. Pomerantz mentioned, the new board,  
20 in consultation with the Committee, is empowered to determine  
21 whether a CEO should be retained. It's possible that one of  
22 the independent directors could be that CEO, Your Honor. But  
23 we wanted to make clear that that was an important part of the  
24 structure, should the board determine that that was the way it  
25 wanted to go.

1           So, in sum, Your Honor, we believe that the independent  
2 board has the clear authority and the skillset that's  
3 necessary to take control and will be actively and  
4 aggressively doing so.

5           But let me be clear, rest assured, Your Honor, this is not  
6 going to be a board that answers to the Committee in that  
7 sense. I think that we will all be moving together  
8 directionally, but it's very possible that I will be in front  
9 of Your Honor arguing against a decision that this independent  
10 board made. So I want to assure Your Honor that although the  
11 Committee was very active and in fact picked Mr. Seery and Mr.  
12 Dubel, and then Mr. Pomerantz detailed how the third director  
13 was picked, we understand who their duty -- what their duty is  
14 and we also understand that they're not a rubberstamp for the  
15 Committee, Your Honor. And so I wanted to make that point to  
16 you to assure Your Honor that that's not the structure that's  
17 being set up here, nor are they the type of individuals that  
18 would allow that to happen.

19           Additionally, Your Honor, the settlement grants the  
20 Committee standing to pursue estate causes of action against  
21 the related parties. That was very important to us, Your  
22 Honor.

23           And in addition to that, the settlement provides the  
24 Committee access to privileged documents and sets forth a  
25 discovery protocol that will assist the Committee in its

1 investigation.

2 The Committee strongly believes that Mr. Dondero's  
3 repeated past behavior, that there are many questionable  
4 transactions that will need to be thoroughly investigated and  
5 pursued. And so having those causes of action with the  
6 economic party in interest related to those causes of action,  
7 the Committee and its constituencies, we thought was very  
8 important and very critical.

9 Granting standing, Your Honor, as I mentioned, avoids any  
10 issues regarding who will be controlling those claims.

11 I'll touch on this in a moment, but Mr. Pomerantz talked  
12 about Mr. Dondero remaining in name as an employee. Let me  
13 assure Your Honor that that is not a backdoor around the  
14 Committee's ability to investigate and immediately pursue  
15 claims against him should that be the course that we choose to  
16 take. So he's not part of that carve-out for current  
17 employees. That's not at all happening. That would never be  
18 something that my Committee would be comfortable with. So I  
19 wanted to make clear to Your Honor that that's not something  
20 that's happening with sort of this late edition of Mr.  
21 Dondero's continuing on in name as an employee.

22 Your Honor, the settlement also lays out a very detailed  
23 set of operating protocols which we do believe are appropriate  
24 and provides the Committee with transparency, which I've been  
25 expressing to Your Honor we've needed since this case has



1 started.

2 Finally, as we point out in our reply and as would always  
3 be the case, should new facts develop or the situation demand  
4 it, the Committee reserves the right to seek a Chapter 11  
5 trustee, as does any other party in interest, to the extent it  
6 may be appropriate at that time.

7 In short, Your Honor, the Committee very carefully and  
8 diligently weighed the independent director option versus the  
9 Chapter 11 trustee option. The Committee had very clear goals  
10 in mind, as I expressed to you, and determined that those  
11 goals could be achieved in a value-maximizing manner through  
12 the independent director structure.

13 The negotiations were very intense, and it was only after  
14 the Committee determined that each piece of the settlement was  
15 to its satisfaction did it ultimately conclude that the  
16 settlement maximizes value for all stakeholders while at the  
17 same time protecting those stakeholders from exposure to  
18 continuing insider dealing, breaches of duty, and  
19 mismanagement.

20 Therefore, the Committee believes approving the settlement  
21 is in the best interest of the estate, and therefore it  
22 believes it should be approved.

23 I do want to offer a word about Mr. Dondero continuing as  
24 an employee. As Your Honor was aware, the term sheet as  
25 originally filed provided that Mr. Dondero would, among other

1 things, resign as an employee of the Debtor. Mid to late  
2 afternoon yesterday, Mr. Ellington called me and said that the  
3 Debtor was now of the view that Mr. Dondero should remain on  
4 as an employee in that capacity for the benefit of the estate.  
5 The Committee was, very appropriately, very skeptical of this,  
6 as well as the sort of last-minute offer, last-minute, you  
7 know, addition, however you want to view it -- some might  
8 argue retrade -- that Mr. Dondero was to leave the Debtor,  
9 period. That was our view. That was the way that the term  
10 sheet was initially structured. And under no circumstances  
11 was the Committee going to allow Mr. Dondero to have any  
12 control over this Debtor.

13 Your Honor, the Committee doesn't know what, if any, the  
14 consequences are of removing Mr. Dondero as an employee. And  
15 we're not conceding at all that there are any value lost by  
16 removing Mr. Dondero as an employee. Instead, what we're  
17 doing is we're staying true to our structure with the  
18 independent directors and we're empowering them to decide.  
19 And so it's consistent with, you know, our goals of having the  
20 independent director structure in place. And under the  
21 settlement as now constructed, even with this late addition or  
22 adjustment, Mr. Dondero would remain as an employee in name  
23 only, subject in all respects to the direction, oversight, and  
24 removal by the independent board. And importantly, should  
25 they decide to do that, Mr. Dondero shall resign. And he

1 shall receive no compensation.

2 So he will not be in control of this Debtor. The  
3 independent directors are. And he's not going to be empowered  
4 to make decisions on behalf of the Debtor. Instead, we're  
5 empowering our independent directors to make those decisions  
6 and determinations on behalf of the Debtor.

7 I wanted -- I thought it was important that I provide that  
8 perspective to Your Honor, as this is something that came in  
9 at a very, very late hour.

10 Overall, Your Honor, for the reasons I have stated and the  
11 reasons in our reply, the Committee, as a fiduciary of all  
12 creditors in this case, believes that the settlement is in the  
13 best interests of the creditors and should be approved. And  
14 at this time, it's the better alternative than the cost,  
15 delay, and uncertainty resulting from a Chapter 11 trustee  
16 fight and the potential appointment of a Chapter 11 trustee.

17 It is time to put the governance issues behind us, Your  
18 Honor, and to move forward to determine how to maximize value  
19 for the creditors and how to get them paid.

20 Your Honor, just regarding the specific resolutions of  
21 objections that Mr. Pomerantz put on the record, I agree with  
22 how Mr. Pomerantz characterized those, and the Committee is  
23 supportive of those resolutions as well.

24 Those are all my remarks, Your Honor, but I am happy to  
25 answer any questions or address any concerns Your Honor may

1 have.

2 THE COURT: Okay. Two follow-up questions. First, I  
3 know I asked you this at a previous hearing and you told me,  
4 but your Committee, as I recall, is very well constituted.  
5 Just remind me of the members.

6 MR. CLEMENTE: Yes.

7 THE COURT: You have a representative from the  
8 Redeemer Committee, --

9 MR. CLEMENTE: Yes, Your Honor.

10 THE COURT: -- which is a \$140 million or so  
11 arbitration award?

12 MR. CLEMENTE: Yes, Your Honor.

13 THE COURT: Okay. And who else is on the Committee?  
14 Is an Acis representative?

15 MR. CLEMENTE: Acis is on the Committee, Your Honor.

16 THE COURT: Uh-huh.

17 MR. CLEMENTE: Meta-e Discovery, who is a trade  
18 vendor of the Debtor, is on the Committee. And UBS  
19 Securities, who is also --

20 THE COURT: Okay.

21 MR. CLEMENTE: -- a litigation claimant, is on the  
22 Committee.

23 It was the U.S. Trustee in Delaware's parting gift to me  
24 to name a four-member committee, Your Honor.

25 (Laughter.)

1 THE COURT: Okay. Makes it awkward at times. And  
2 then back to the Dondero subject.

3 MR. CLEMENTE: Yes, Your Honor.

4 THE COURT: I mean, again, both Mr. Pomerantz and you  
5 clarified that the proposal now is the new board will decide  
6 if he stays on, Mr. Pomerantz said as a portfolio manager.

7 MR. CLEMENTE: That is correct, Your Honor.

8 THE COURT: Am I -- I mean, I'm hearing that  
9 correctly?

10 MR. CLEMENTE: That is correct, Your Honor.

11 THE COURT: So, right now, whatever officer positions  
12 he has, he's technically not resigning? Or --

13 MR. CLEMENTE: He is resigning as an officer of the  
14 company, Your Honor.

15 THE COURT: Okay. He's resigning? So the board will  
16 just decide, is he going to be a portfolio manager or some --  
17 whatever the employee title is?

18 MR. CLEMENTE: Or they could decide that he's not  
19 necessary.

20 THE COURT: Or not necessary? In any event, no  
21 compensation?

22 MR. CLEMENTE: That is correct, Your Honor.

23 THE COURT: Okay.

24 MR. CLEMENTE: And as you can see, the term sheet  
25 provides that Mr. Dondero shall not cause any related entity

40

1 to terminate any agreements with the Debtor as well. That was  
2 language that was added last night as well.

3 THE COURT: All right. So they're going to make the  
4 decision, does he help preserve value by staying in some  
5 capacity or not?

6 MR. CLEMENTE: That is correct, Your Honor.

7 THE COURT: Okay.

8 MR. CLEMENTE: That, cutting through it, that is the  
9 way that ultimately the Committee views it.

10 THE COURT: Okay.

11 MR. CLEMENTE: And if there's an opportunity -- and  
12 I'm not conceding that there is. I'm not conceding that he  
13 preserves any value.

14 THE COURT: Uh-huh.

15 MR. CLEMENTE: But we wanted to give the option to  
16 our independent directors to make that determination. Because  
17 if there's an opportunity to preserve value, that's what we're  
18 trying to achieve.

19 THE COURT: Okay. And I don't even know if you've  
20 thought through this. Would there be some sort of notice  
21 filed on record in the case if --

22 MR. CLEMENTE: If --

23 THE COURT: -- if the decision is made to --

24 MR. CLEMENTE: To -- to --

25 THE COURT: -- hire him or keep him as a portfolio

1 manager?

2 MR. CLEMENTE: So, I think the default under the term  
3 sheet, as revised, is he stays in that capacity in terms of  
4 name. The independent directors will -- they're subject to  
5 his control and direction, and they could decide to remove  
6 him.

7 THE COURT: Uh-huh.

8 MR. CLEMENTE: Perhaps if Your Honor --

9 THE COURT: Okay.

10 MR. CLEMENTE: We could provide notice if they make  
11 the determination to remove him, but I think the default is  
12 that, you know, he's in that -- he's remaining as that  
13 employee name currently. So that's the current default.

14 THE COURT: Okay. All right. Thank you.

15 MR. CLEMENTE: Thank you very much, Your Honor.

16 THE COURT: Well, Ms. Patel, you're getting up so  
17 I'll hear -- I don't know who all has been in the loop over  
18 this overnight development.

19 OPENING STATEMENT ON BEHALF OF ACIS CAPITAL MANAGEMENT

20 MS. PATEL: Your Honor, Acis has been in the loop as  
21 a member of the Committee. And I will be very brief with  
22 respect to Acis's individual comments. And I just want to be  
23 clear: Obviously, I'm here as counsel for Acis, and so this  
24 is Acis's individual position. Mr. Clemente aptly and very  
25 ably handled the Committee's overall position with respect to

1 this.

2 But Your Honor, I just want to, on behalf of Acis, make  
3 sure that, because of these developments, that's really -- I  
4 really had hoped to have zero role today, but I want to make  
5 sure that we're -- Acis is on record with respect to our  
6 position. And obviously, given Your Honor's knowledge and  
7 oversight of the long history of Acis's bankruptcy case and  
8 seeing some of the events that transpired there, I'm sure that  
9 this will all, against that backdrop, make an awful lot of  
10 sense.

11 But, you know, it's this continued role for Mr. Dondero  
12 that is of concern. You know, this issue even being raised  
13 within like the last 48 hours by Mr. Ellington, the timing of  
14 it just creates an issue. I mean, did this -- how could this  
15 possibly have come out of left field when this is such a huge  
16 part of what the Debtor does in its ordinary course of  
17 business, is serve as a portfolio manager, and these are  
18 contracts that have been negotiated, generally speaking,  
19 internally by Highland. So the fact that if Mr. Dondero were  
20 to exit the structure and there would be some potential  
21 ramifications to that, I've got to wonder how much of a  
22 surprise could that really have been to Highland folks.

23 But I just wanted to highlight, in connection with the  
24 term sheet -- this is the preliminary term sheet that was  
25 handed up Your Honor, and I believe Your Honor has a redline



1 version of it as well --

2 THE COURT: Uh-huh.

3 MS. PATEL: -- on Page 2, with respect to the role of  
4 Mr. James Dondero, there's various provisions in there. And I  
5 guess I would be remiss, Your Honor, if I didn't say, at least  
6 out of the gate, Acis obviously supports the implementation of  
7 this independent board of directors. We believe all the  
8 candidates are very capable and are -- we put our reliance  
9 upon them.

10 Obviously, we don't concede any issues. We'll see what  
11 we're going to do. But certainly, for the time being, we do  
12 support the entry of this agreement of the settlement -- or,  
13 I'm sorry, approval of the settlement agreement by the Court  
14 that lets the independent board be put into place.

15 But what I'll focus the Court on, on Page 2 under the role  
16 of Mr. James Dondero, it goes through various provisions as to  
17 what he'll resign to -- positions he'll resign from and that  
18 he will remain as an employee of the Debtor, including  
19 maintaining his title as portfolio manager for all funds and  
20 investment vehicles for which he currently holds that title.  
21 And then it goes on to provide as to who he'll report to and  
22 how he will be governed, which includes by the independent  
23 board, he will receive no compensation, and that he will be  
24 subject to at all times the supervision, direction, and  
25 authority of the independent directors.

1           Again, we have faith that the independent directors will  
2           oversee this and will govern his role accordingly. However,  
3           given Acis's history with how transactions have transpired at  
4           Highland, we remain highly cautious with respect to what  
5           happens next.

6           And to that end, Your Honor, the very last sentence there  
7           on Page 2, "Mr. Dondero shall not cause any related entity to  
8           terminate any agreements with the Debtor," is a key provision  
9           of this that keeps Acis, as a Committee member, on board with  
10          this agreement. I wanted to highlight that and note that, in  
11          the last less than 48 hours, in the last 12 hours, or maybe a  
12          little bit more than that, call it 18 to be safe, that's where  
13          -- that's a provision that's been -- that's where we've ended  
14          up. It's all of these issues have been going at lightning  
15          speed, but I did want to just, for the record and so everybody  
16          is clear, that is an important piece of this agreement to --  
17          for Acis.

18          And as Your Honor knows, this Debtor, Highland, is wont to  
19          try to terminate agreements and to try -- in an attempt to try  
20          and transfer valuable contracts away and valuable revenue  
21          stream away from an entity to an alternate entity. And that's  
22          really the heart of our concern, Your Honor.

23          So, with that, I just wanted to be clear and be on record  
24          as to Acis's position. Thank you.

25                 THE COURT: Thank you. All right.

1 MR. POMERANTZ: Your Honor, if I briefly may respond  
2 to the issues with Mr. Dondero while they are fresh in Your  
3 Honor's mind?

4 THE COURT: Okay. Okay.

5 MR. POMERANTZ: Your Honor, look, we appreciate the  
6 timing of this coming to the attention of the Committee as  
7 being less than optimal. As Your Honor can appreciate, this  
8 case that's been filed three months ago, a lot of people are  
9 looking very carefully at what's happening to the Debtor.  
10 Investors are looking. There was a transfer of venue. There  
11 have been a lot of reports about potential trustee motions.  
12 And we believe a lot of parties are waiting to see the outcome  
13 of this hearing and the trustee hearing to determine whether  
14 they will determine to continue to do business with the  
15 Debtor.

16 It's not only an issue of contractual rights. It's also  
17 an issue of whether investors feel comfortable on who is  
18 managing, who is managing their investments.

19 This issue of Mr. Dondero's continuing role has been  
20 something that at the Debtor we've continued to grapple with  
21 over the last several weeks. It's always been our thought  
22 that we should do nothing that would unduly harm the company  
23 from an economic standpoint. I think the Committee shares  
24 that. That if it's determined by an independent board -- and  
25 don't take current Debtor professionals, don't take current

1 Debtor employees' word for it -- but if they determine that  
2 there's an economic benefit by keeping him on to preserve  
3 material revenue stream, they should be able to make that  
4 determination. I think that's really at the core here. And I  
5 think the Committee got ultimately comfortable with it because  
6 it will be an independent board, the majority of the members  
7 identified and chosen by them and accepted by the Debtor.

8 So, again, we apologize to the parties and the Court for  
9 bringing this on late. It wasn't my intent to come here and  
10 present modified versions of the term sheet that hadn't been  
11 filed. But that's where we are, and that's why it has come  
12 up, and that's why it's an extremely important issue, because  
13 preserving whatever revenue we can for the Debtor is  
14 important.

15 Now, at the end of the day, the board may either decide  
16 that he doesn't preserve the revenue, or the negatives from  
17 keeping him involved with the company outweigh any benefits.  
18 And that's a decision they will have to make, and it'll be  
19 their province to make. So I just wanted to give Your Honor  
20 that perspective.

21 THE COURT: Okay.

22 MR. DAUGHERTY: Your Honor, may I approach?

23 THE COURT: Mr. Daugherty? You may.

24 OPENING STATEMENT ON BEHALF OF PATRICK DAUGHERTY

25 MR. DAUGHERTY: I apologize. I was not planning to

1 address the Court at all today. I would have had my attorney  
2 here for it. But I just ask a little bit of indulgence to  
3 represent myself *pro se* for this issue.

4 This is the first I've heard that Mr. Dondero would stay  
5 with the company. I think it's an awful idea. There's a  
6 litany of reasons for that.

7 By the way, I'm completely in support of this -- of this  
8 board that's been chosen. I have every confidence that  
9 they'll be able to make good decisions eventually. But  
10 they're stepping into this thing new. Obviously, I've been  
11 through this in your court with *Acis* and other matters, and I  
12 have deep, deep concerns about Mr. Dondero continuing in that  
13 role, simply because of the influence it has on the rest of  
14 the organization and the message that it sends, both  
15 internally and externally, of where the company goes from  
16 here.

17 So I just wanted to let you know my thoughts. I wasn't  
18 planning to make them. I haven't filed anything. But that's  
19 where I stand.

20 THE COURT: All right. Thank you, Mr. Daugherty.

21 All right. Before we hear from the U.S. Trustee, who I  
22 know is going to have a lot to say, let me just circle back  
23 briefly to Jefferies counsel and the CLO Issuers' counsel.  
24 You heard the representations of Mr. Pomerantz earlier about,  
25 well, first, in the case of Jefferies, that the Debtor has

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1 agreed to language to address your concerns. Do you want to  
2 weigh in on that and confirm that you're content that you're  
3 going to have language to work out your concerns?

4 OPENING STATEMENT ON BEHALF OF JEFFERIES, LLC

5 MR. MAXCY: Thank you, Your Honor. Patrick Maxcy for  
6 Jefferies.

7 No, I don't have anything additional to add to what Mr.  
8 Pomerantz said. The language that we have worked out will  
9 speak for itself and will be included in the order.

10 THE COURT: All right. Thank you.

11 And counsel for the CLO and CDO Issuers, do you confirm  
12 that you would be in agreement to basically withdraw your  
13 objections for now, but perhaps come back and make argument on  
14 the 21st if you have not worked out language with the  
15 Committee that you think works?

16 OPENING STATEMENT ON BEHALF OF THE ISSUER GROUP

17 MR. BENTLEY: James Bentley from Schulte Roth for the  
18 Issuers, Your Honor.

19 I believe the deal that Mr. Pomerantz and Mr. Clemente  
20 and I have discussed was adjourning our objection to the 21st,  
21 --

22 THE COURT: Okay.

23 MR. BENTLEY: -- rather than withdrawing it.

24 THE COURT: Okay.

25 MR. BENTLEY: We're -- we believe we will be able to

1 come up with language acceptable to the Issuers, but we would  
2 like to reserve the right to come back to the Court on our  
3 limited objection if we cannot, given that our issue is really  
4 -- really only relates to the 25 Issuers we represent.

5 THE COURT: Okay. Thank you very much.

6 All right. Ms. Lambert?

7 OPENING STATEMENT ON BEHALF OF THE UNITED STATES TRUSTEE

8 MS. LAMBERT: May it please the Court. As the Debtor  
9 acknowledges, the motion that they are settling, the issues  
10 that they are settling, are the issues that the U.S. Trustee  
11 has raised in his motion to appoint a Chapter 11 trustee. As  
12 a matter of statutory construction, Section 1104 does not  
13 contemplate settlement of these issues. 1112, in contrast,  
14 has a provision that if the Court finds and determines that  
15 there is cause to convert a case, there are unusual  
16 circumstances and the Court can find a reasonable  
17 justification for the wrongdoing or the error that occurred  
18 that led to cause -- for example, administrative defects in  
19 1112, not filing monthly operating reports -- and that can be  
20 cured. The Court has to make a finding that those -- these  
21 defects can be cured within a reasonable period of time.  
22 Section 1104 contains no analog to his.

23 If the Court finds cause to direct the appointment of a  
24 Chapter 11 trustee, then the Court is supposed to appoint a  
25 Chapter 11 trustee. And *Trailer Ferry* and *AWECO* both stand

1 for the proposition that, on today's day, we're supposed to  
2 have evidence about what the management issues are that led to  
3 this agreement. There's been no evidence. There's been no  
4 allegations in the motion for settlement. And so the U.S.  
5 Trustee is prepared to put that evidence on.

6 And Your Honor, one aspect of this is that the arbitration  
7 agreement has been sealed. And there are people on the phone.  
8 I don't know who's on the phone. The U.S. Trustee has opposed  
9 the sealing of the arbitration -- not arbitration agreement,  
10 the arbitration judgment -- has opposed the sealing of that.  
11 And then they referenced a confidentiality order as the basis  
12 to seal it. The U.S. Trustee also opposed that  
13 confidentiality motion, which was filed subsequently to the  
14 motion to seal.

15 There is no confidentiality order. An interim order was  
16 entered sealing the arbitration award, but -- and the U.S.  
17 Trustee has honored that by redacting all of the pleadings  
18 that we filed relating to that, but it's important today for  
19 the U.S. Trustee to be able to discuss it in argument, and it  
20 is here -- and we have it prepared to be admitted into an  
21 exhibit.

22 So, to proceed with my argument, Your Honor, I need some  
23 clarification about what I can say.

24 THE COURT: You want clarification from me on what  
25 you can say?



1 MS. LAMBERT: Well, I mean, either that or we need to  
2 clear the room.

3 THE COURT: I've read the arbitration award.

4 MS. LAMBERT: Right.

5 THE COURT: It's in my brain.

6 MS. LAMBERT: Right. Okay.

7 THE COURT: Uh-huh.

8 MS. LAMBERT: And so one of the arguments here today  
9 is that the U.S. Trustee is representing the SEC and  
10 representing other Government agencies and things. No.  
11 Obviously, that is not the U.S. Trustee --

12 THE COURT: I didn't hear that.

13 MS. LAMBERT: Okay. The -- one of the positions has  
14 been, in the papers, is, well, that we don't have standing to  
15 raise their issues. And that's true.

16 THE COURT: Okay.

17 MS. LAMBERT: But the problem is that the U.S.  
18 Trustee has been constrained from discussing those issues with  
19 the SEC. The arbitration award is very relevant to the SEC's  
20 oversight. I anticipate the evidence today will be that the  
21 SEC, after the financial crisis of 2008, imposed restrictions  
22 on this Debtor on breach of fiduciary duty issues. I  
23 anticipate that the arbitration findings would be very  
24 relevant to whether those issues are ongoing or not.

25 THE COURT: Okay. Let me weigh in. I view the legal

1 standard that this Court has to weigh today as being: Is the  
2 Debtor proposing something that is reflective of sound  
3 business judgment, reasonable business judgment? And to the  
4 extent this is a compromise of controversies with the  
5 Committee, is this fair and equitable and in the best interest  
6 of the estate?

7 And as Mr. Pomerantz has said, you know, a lot of this  
8 maybe doesn't even need Court approval. But to the extent  
9 there are aspects of this that are appropriate to seek Court  
10 approval on, you know, this is my task. I have to look at  
11 what's presented, and is this reflective of sound business  
12 judgment? Is this fair and equitable? Is it in the best  
13 interest?

14 So, assuming there are tons of bad facts here reflected in  
15 the arbitration award, reflected in other evidence, bad facts  
16 that might justify a trustee, a Chapter 11 trustee, is this  
17 nevertheless, what's proposed today, a reasonable compromise  
18 of, you know, the trustee arguments the Committee could make  
19 or, you know, is this a reasonable framework for going  
20 forward? Okay?

21 So I guess what I'm saying is I'm confused about, you  
22 know, do I need to look at the arbitration award? Do we need  
23 to have evidence of all of that? I can assume that there are  
24 terrible facts out there that might justify a trustee, but I'm  
25 looking at what's proposed. Is this a fair and equitable way

1 to resolve the disputes? Is it sound business judgment?  
2 Frankly, is it a pragmatic solution here to preserve value?  
3 So that's the legal standard I have in my mind here.

4 MS. LAMBERT: Yes, Your Honor.

5 THE COURT: Okay.

6 MS. LAMBERT: The standard is whether it is fair and  
7 equitable to resolve the issues in the Chapter 11 trustee  
8 motion, and it is the U.S. Trustee's position that they are  
9 not resolved by this. And how are they not resolved? Number  
10 one, they're not resolved because the problems that led to the  
11 breach of fiduciary duty issues and findings are more  
12 pervasive, both based on this Court's finding in the *Acis* case  
13 and in the arbitration court's finding in Mr. Dondero. Other  
14 officers are implicated.

15 THE COURT: But how --

16 MS. LAMBERT: Other employees are implicated.

17 THE COURT: Okay. I feel like maybe we're talking at  
18 each other, not getting each other. I've got a proposed  
19 solution here to totally change the playing field, if you  
20 will. Bring in incredibly qualified people to --

21 MS. LAMBERT: Those people --

22 THE COURT: -- to change out the, you know, the  
23 person that you say breached fiduciary duties, the, you know,  
24 mismanagement, whatever bad labels we have here, but bring in  
25 a clean slate.

1 MS. LAMBERT: No, Your Honor, because employees  
2 remain at the Debtor who are problematic. The board that is  
3 appointed owes a fiduciary duty to whom? Strand. Dondero.  
4 He's still the board -- he is the sole stockholder. Yes. In  
5 addition, --

6 THE COURT: And they won't be taking directions from  
7 him.

8 MS. LAMBERT: In addition, --

9 THE COURT: The term sheet is they won't be taking  
10 directions from him.

11 MS. LAMBERT: Your Honor, there is no evidence before  
12 the Court today that Mr. Dondero has entered a stipulation.  
13 This is part of the problem. This continues --

14 THE COURT: Well, if he doesn't, in five minutes the  
15 Committee is going to be filing their trustee motion, right?

16 MS. LAMBERT: Well, then we haven't saved any time or  
17 any money. This is the whole issue. They have to put on  
18 evidence that this is a resolution of issues. We're going to  
19 have the motion to appoint a Chapter 11 trustee either way.

20 THE COURT: All right. Well, we did have the  
21 evidence of Mr. Sharp. Would you like to cross-examine him at  
22 this point?

23 MS. LAMBERT: Your Honor, I would like to put the  
24 U.S. Trustee's exhibits into evidence and then cross-examine  
25 him.

1 THE COURT: All right. Your exhibits?

2 MR. POMERANTZ: Your Honor, we would object to any  
3 exhibits. The Trustee has not filed an exhibit list.

4 MS. LAMBERT: Your Honor, this matter was set on an  
5 expedited basis and the Court does not require exhibit and  
6 witnesses lists when a matter is filed on an expedited basis.  
7 It's impossible, when a response is filed at 5:00 o'clock the  
8 evening before and supplements are made in the morning of the  
9 hearing, for the U.S. Trustee to put on a witness and exhibit  
10 list.

11 MR. POMERANTZ: Your Honor, we were here on the 19th.  
12 We set out a briefing schedule. And maybe it was a couple  
13 days short of normal notice. Ms. Lambert agreed to issue  
14 discovery by a certain date, and she at no point said that  
15 because there was 13 days' notice as opposed to longer period  
16 that she couldn't comply and provide a witness list.

17 We provided with a witness list. We provided an exhibit  
18 list. The Trustee's effort and attempt to now submit exhibits  
19 and rely on maybe there were some changes this morning, that  
20 just doesn't cut it, and that's not fair and that's not due  
21 process.

22 THE COURT: Okay. I sustain the objection. The  
23 exhibits won't be admitted since there was no exhibit list.

24 MS. LAMBERT: Your Honor, I do not have an exhibit  
25 list from them. And they --

1 THE COURT: Well, they haven't offered any.

2 MS. LAMBERT: They put on new exhibits this morning.  
3 The exhibits that the U.S. Trustee has are all things that  
4 they are familiar with.

5 THE COURT: Let me back up. They didn't introduce  
6 any exhibits. They --

7 MS. LAMBERT: But they introduced the declaration,  
8 they introduced the supplements to the agreement that were  
9 drafted this morning, they've introduced the new corporate  
10 resolutions, all of which they handed me this morning.

11 THE COURT: All right. Well, the declaration of Mr.  
12 Sharp, it's two pages long. It is, I don't think, any kind of  
13 surprise information.

14 MS. LAMBERT: Your Honor, --

15 THE COURT: I'll allow you to cross-examine him.

16 MS. LAMBERT: -- the U.S. Trustee's exhibits are no  
17 surprise, either. The *Acis* opinion is no surprise to anybody  
18 in this courtroom.

19 THE COURT: Okay. Well, what are your exhibits?

20 MS. LAMBERT: The --

21 THE COURT: I probably should have asked.

22 MS. LAMBERT: The exhibits are the *Acis* opinion, the  
23 arbitration awards or the determinations, both the partial and  
24 the final, and the SEC's original judgment. There are four  
25 exhibits.

1 THE COURT: All right. Well, Mr. Pomerantz, what  
2 would you like to say? One of them I have obviously seen,  
3 since I wrote it.

4 MR. POMERANTZ: Yes, you've written it. You wrote  
5 it.

6 (Laughter.)

7 MR. POMERANTZ: Your Honor, I think this is a tempest  
8 in a teapot. The Committee's brief that it filed in  
9 opposition to the CRO retention, the ordinary course  
10 protocols, and the cash management motion had a litany of  
11 description of the Redeemer litigation, of the SEC litigation.  
12 There are plenty of bad facts out here. Okay? We have an  
13 interim order to seal. There was no hearing set today for our  
14 final hearing.

15 The Trustee has objected to that order, and I suspect that  
16 will be heard on the 21st. We don't think it's appropriate to  
17 introduce the Redeemer award. However, we have read the  
18 redacted provisions or portion of the U.S. Trustee's brief,  
19 and we have no problem if the U.S. Trustee limits its argument  
20 to the redacted portion in presenting that to the Court.

21 In other words, we don't believe that the few sentences  
22 that were redacted need to be redacted.

23 However, to the extent they intend to submit the  
24 arbitration award, we don't think it's appropriate, we don't  
25 think it's necessary, we think Your Honor hit it right, that

1 the issues today are not whether there's mismanagement at the  
2 Debtor. Okay?

3 The U.S. Trustee's position is, notwithstanding this new  
4 structure, it doesn't work. She has a trustee motion on. She  
5 can argue on the 21st that it doesn't work. Nobody is  
6 prejudicing her right to do so.

7 We think it's prejudicial, it's unfair, it's procedurally  
8 improper to submit the Redeemer arbitration award and to allow  
9 the Trustee to do anything other than describe exactly what  
10 she has in her pleading.

11 THE COURT: Okay. I sustain the objection to those  
12 exhibits. Again, I've read them. They're in my brain. I  
13 wrote one of them. But I will allow you to cross-examine Mr.  
14 Sharp. So, Mr. Sharp, would you please come to the witness  
15 stand? Please raise your right hand.

16 BRADLEY SHARP, DEBTOR'S WITNESS, SWORN

17 THE COURT: All right. Please be seated.

18 MS. LAMBERT: To clarify, Your Honor, has the Court  
19 considered the *Acis* opinion and the arbitration opinions based  
20 on judicial notice?

21 THE COURT: And we're doing a lot of hair-splitting  
22 here. I'm just letting you know I -- the facts are in my  
23 brain. You can't extract them from my brain. Okay?

24 MS. LAMBERT: Okay.

25 THE COURT: I know there have been a lot of bad



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1 things, arguably bad things. But to me, the real issue here  
2 today is whether this framework that has been heavily  
3 negotiated with the Committee reflects reasonable business  
4 judgment on the part of the Debtor, is a fair and equitable  
5 resolution of the Committee's, you know, arguments in favor of  
6 a trustee, and whether this makes, you know, sense going  
7 forward to allow this Debtor to go forward without a trustee.  
8 Okay?

9 So I really think that the evidence you want is not  
10 terribly relevant. We technically aren't here on a trustee  
11 motion today. We're here on whether a new board and the  
12 terms, the protocols suggested, reflect reasonable business  
13 judgment and reflect a fair compromise of arguments the  
14 Committee has raised. All right? So I don't know how much  
15 more clear I can make that. I guess the technical answer is  
16 I'm not taking judicial notice of those things for purposes of  
17 today.

18 All right. You may proceed.

19 CROSS-EXAMINATION

20 BY MS. LAMBERT:

21 Q Mr. Strand, can you state your name for --

22 A Sorry. Bradley Sharp, S-H-A-R-P.

23 Q Sharp. Mr. -- oh, sorry.

24 A No relation to Strand.

25 Q All right. Strand is the general partner of the Debtor,

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1 right?

2 A That is correct.

3 Q And there has been no change in the board of the Debtor  
4 except Mr. Dondero's resignation; is that right?

5 A Well, it's a little different, because the -- Strand is  
6 the general partner of the Debtor.

7 Q Yes.

8 A So the new board will be acting and in control of the  
9 Debtor.

10 Q Yes. And there is -- Strand is a non-debtor, correct?

11 A That is correct.

12 Q And the stock of the non-debtor, Strand, is owned by  
13 Dondero?

14 A Mr. Dondero owns Strand Advisors.

15 Q In its entirety?

16 A That is correct.

17 Q So the board will owe a fiduciary duty to Mr. -- to Mr.  
18 Dondero?

19 A The board will have a fiduciary duty to the Debtor and to  
20 Strand Advisors.

21 Q All right.

22 A Their duty is to the entity.

23 Q The -- Strand, as the general partner, as an entity, owes  
24 a fiduciary duty to the Debtor, right?

25 MR. MORRIS: Objection to the extent it calls for a

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1 legal conclusion.

2 THE COURT: Sustained.

3 BY MS. LAMBERT:

4 Q Do you know?

5 A As a lay person. I'm not an attorney.

6 Q Okay. So you don't know what the fiduciary roles of the  
7 board will be; is that right?

8 A Well, the fiduciary board will be acting -- you know,  
9 looking at it from my perspective as the chief restructuring  
10 officer, the new board will be acting as the Debtor-in-  
11 Possession. And, you know, they will be directing the Debtor-  
12 in-Possession. You know, the Debtor-in-Possession has duties  
13 to all parties in interest, and they will be directing the  
14 Debtor. They will be directing me as CRO.

15 Q And, in addition, there may be a CEO, right?

16 A That is contemplated, correct.

17 Q It is contemplated? It --

18 A It is -- it is an option that the board has if they think  
19 a CEO is necessary.

20 Q But you don't know whether a CEO is going to be appointed  
21 or not?

22 A That's up to the board.

23 Q And you don't know what the compensation for that  
24 individual might be, right?

25 A Again, that's up to the board.

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1 Q Mr. Dondero is going to be an employee of the Debtor,  
2 right?

3 A That's correct.

4 Q And Mr. Dondero started the Debtor, correct?

5 A I believe so.

6 Q And he also started Strand, right?

7 A I believe that's correct.

8 Q And he is also in control of a number of entities that the  
9 Debtor does business with; is that right?

10 A That is correct.

11 Q Mr. Ellington is going to remain on with the Debtor?

12 A That -- Mr. Ellington is an employee. All employees are  
13 now subject to the board.

14 Q Okay. And Mr. Ellington's role with the Debtor is what?

15 A He is general counsel with the Debtor.

16 Q And there are other in-house attorneys with the Debtor,  
17 right?

18 A That's correct.

19 Q And who else is there currently?

20 A I don't have the list in front of me, you know, the  
21 employee list. As of now, because obviously this is still --  
22 hasn't been effected, so the board has not made any decisions  
23 with respect to any employees going forward.

24 Q And the CFO remains the same?

25 A Yeah, that is, again, as of now. I don't know what the

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1 board is going to do, if anything.

2 Q Do you have any anticipation of what you would recommend  
3 to the board regarding the CFO?

4 A You know, I have many recommendations I have not made to  
5 the board yet. I just met them this morning.

6 Q Are you aware that historically this Court has found that  
7 the lawyers provided bad advice to the Debtor?

8 MR. MORRIS: Objection to the form of the question.

9 THE COURT: Sustained.

10 BY MS. LAMBERT:

11 Q Do you have any knowledge about whether there have been  
12 findings that the law firm gave erroneous advice to the  
13 Debtor? Or, I mean, the in-house counsel gave erroneous  
14 advice.

15 MR. MORRIS: Objection to the form of the question.

16 THE COURT: Sustained.

17 MS. LAMBERT: Your Honor, I'm asking for the  
18 foundation.

19 THE COURT: Rephrase.

20 BY MS. LAMBERT:

21 Q Do you -- are you aware of any concerns about the in-house  
22 counsel?

23 A Yes.

24 Q What is your knowledge?

25 A I have read the rulings from this Court.

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1 Q And what is your understanding of those rulings?

2 A I don't recall specifically. I read that early on when I  
3 was first employed. But there have been concerns with respect  
4 to, you know, management of the Debtor.

5 Q As the CRO, have you made any recommendations to change  
6 employees to date?

7 A As of now, I don't have a -- the board. You know, the  
8 board has just been employed. We have not made  
9 recommendations up to this point. We are still -- obviously,  
10 have been evaluating our position and what needs to happen. I  
11 think it's important for the Debtor at this time, a little  
12 stability would be a good thing for -- until we develop the  
13 direction going forward.

14 Q Are you familiar with the compensation terms for the  
15 directors?

16 A Yes.

17 Q And the directors are employees of Strand but paid by the  
18 Debtor; is that right?

19 A Oh, I'm not sure they're employees of Strand, but they are  
20 paid by the Debtor, their compensation. That's correct.

21 Q And yet the compensation is technically through Strand,  
22 right?

23 A They -- they are. They have to act through the general  
24 partner of the Debtor because of the corporate structure.

25 Q One of the portions of the agreement is that the Committee

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1 acquires litigation claims. Are you familiar with that?

2 A I am.

3 Q Have you parsed out which litigation claims those might be  
4 at this point?

5 A I think the agreement says they have litigation claims  
6 against insiders and related parties. So I don't know what  
7 those individual claims are. I don't know what exists.

8 Q Are you aware that the Committee obtains the attorney-  
9 client privilege and work product privilege?

10 A Yeah. Subject to the terms of those agreements, correct.

11 Q Have you gone through the documents and determined which  
12 ones would fall on -- which attorney files would fall on which  
13 side?

14 A Not as of yet.

15 Q Have you been taking direction from Mr. Dondero?

16 A We've had -- I've had limited interaction with Mr. Dondero  
17 since my retention. You know, we have been complying with the  
18 protocols that we had been negotiating with the Committee and  
19 providing information to the Committee. We have been, as a  
20 result of those protocols, instructing management of the  
21 company on compliance with those protocols. So they have  
22 brought to us transactions that they would like to do. We  
23 have reviewed those transactions and compared it to the  
24 proposed protocols and have been enforcing those. So if  
25 management has asked to do a transaction that does not meet

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1 within those protocols, we have been declining the  
2 transaction. And that -- you know, the company has agreed  
3 with that decision and accepted that decision.

4 Q When you say management, who are you -- to whom are you  
5 referring?

6 A You know, the whole management team at the company. In-  
7 house counsel. The CFO. You know, I've had limited  
8 interaction with Mr. Dondero. One interaction was he did  
9 question one of my decisions that I made. We discussed it and  
10 he accepted my conclusion.

11 Q You're at the Debtor every day?

12 A My team is.

13 Q You are not?

14 A I have had some travel restrictions due to a medical  
15 issue, but I have three of my team there every day.

16 Q Is Mr. Dondero there every day?

17 A I don't know. I don't think so. In the few days I'm  
18 there, I've not seen him.

19 Q Is Mr. Ellington there every day?

20 A No.

21 Q Who on the management team is there every day?

22 A You know, our primary interaction is with Isaac Leventon,  
23 Frank Waterhouse, the CFO. You know, primary interaction, you  
24 know, with David Klos, who is the controller, in dealing with  
25 the financial issues.



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1 Obviously, we spend a lot -- my team spends a lot of time  
2 with the head of compliance.

3 Q Were you surprised by this addition that Mr. Dondero would  
4 remain as an employee?

5 A I can't say I was surprised. It is an issue that we  
6 struggle with, given the nature of this company's business.  
7 You know, I see the change in the language and, you know, as  
8 CRO, I am comfortable with it.

9 Q So, as CRO, if Mr. Dondero is necessary now, you recognize  
10 that he was necessary three weeks ago?

11 A I'm not saying that he's necessary. I'm saying that it is  
12 important for the board to be able to make that decision.

13 Q And it wasn't important when the settlement was filed?

14 A It was the -- it was a struggle at the time. I was  
15 concerned at the time it was filed the unintended consequences  
16 of Mr. Dondero resigning completely and disappearing, because  
17 there are a significant number of funds that the Debtor deals  
18 with related parties that are controlled by Mr. Dondero, and I  
19 was worried about the financial impact with it. I knew this  
20 issue was important to the Committee. And if that's something  
21 that the Debtor agreed to and the Committee agreed to, so be  
22 it.

23 You know, I think the last-minute compromise is acceptable  
24 and appropriate. I think the language as negotiated is going  
25 to be very helpful to the Debtor. And I think, then, it's up

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1 to the board to make the decision, with full knowledge on  
2 what's the best avenue forward.

3 Q And the language as negotiated was added because, in the  
4 past, there have been problems with Mr. Dondero changing or  
5 terminating agreements with related entities, right?

6 A There was that -- I've seen that -- issues raised in the  
7 *Acis* case.

8 MS. LAMBERT: No further questions.

9 THE COURT: All right. Any redirect?

10 MR. POMERANTZ: Not from the Debtor.

11 THE COURT: Anyone have examination? No? All right.  
12 Thank you, Mr. Sharp. You're excused.

13 THE WITNESS: Thank you.

14 (The witness steps down.)

15 THE COURT: All right. Are we going to have any  
16 other, I guess, witnesses, evidence?

17 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

18 MR. POMERANTZ: No, Your Honor. I just had a couple  
19 points. One, Ms. Lambert mentioned that she hadn't seen a  
20 copy of the stipulation referred to, which was prohibiting Mr.  
21 Dondero from terminating the board. There's a good reason for  
22 her not having seen it. I hadn't provided it to her. It just  
23 came this morning, right before the hearing. I have one  
24 signed copy. I have other copies that I could represent, even  
25 though they're unsigned, are the same, so I would like to

1 provide Your Honor. I'll keep the signed copy but provide you  
2 with an unsigned copy, but it's the same, and also give one to  
3 the U.S. Trustee.

4 THE COURT: But you've got a signature of Mr. Dondero  
5 on that?

6 MR. POMERANTZ: Yes, I do.

7 THE COURT: Okay.

8 MR. POMERANTZ: May I approach?

9 THE COURT: You may. Thank you.

10 MR. POMERANTZ: Your Honor, maybe for the record it  
11 would be appropriate for me to show Your Honor the signature,  
12 so you could say that you've seen it?

13 THE COURT: Yes. Yes.

14 MR. POMERANTZ: May I approach again?

15 THE COURT: You may. (Pause.) Okay. Thank you.

16 The record will reflect I've seen Mr. Dondero's signature.

17 MR. POMERANTZ: Your Honor, one of the threads that  
18 Ms. Lambert said to Your Honor is that there were employees  
19 still remaining at the Debtor and that those employees may  
20 have been involved in some wrongdoing.

21 I submit, Your Honor, if Your Honor appointed a Chapter 11  
22 trustee today, what would a Chapter 11 trustee do? A Chapter  
23 11 trustee wouldn't terminate every employee at the Debtor. A  
24 Chapter 11 trustee, if he or she was doing what they should  
25 do, would go down to the company, would interview members of

1 the company, senior management, and decide who should stay on  
2 and who should not stay on.

3 That, I submit, Your Honor, is exactly what this board  
4 will do. So the concept of there being something different  
5 done, if you have a board here or not, I don't think makes  
6 sense.

7 And lastly, Your Honor, Ms. Lambert expressed the issue as  
8 whether it's fair and equitable to resolve the U.S. Trustee  
9 issues in this way. I don't think that's the standard. The  
10 only fair and equitable I understand is in plan confirmation.  
11 I think Your Honor said it straight, which is: Is this a  
12 valid exercise of the Debtor's business judgment and is it an  
13 appropriate compromise of controversy? That is the standard.  
14 And, again, we have always acknowledged that, notwithstanding  
15 how Your Honor rules today, the Trustee reserves the right to  
16 come back to court and argue a trustee is appropriate on the  
17 21st.

18 We believe, Your Honor, that many of the cases, in this  
19 circuit and elsewhere, look to the continuing management of  
20 the company and whether management issues have been addressed  
21 as a significant factor in determining whether a trustee is  
22 appointed. And it'll come as no surprise, of course, if Your  
23 Honor grants our motion today, this will be a lynchpin of our  
24 opposition to the trustee motion.

25 But, again, those issues are for another day, and we

1 believe that we have satisfied our standard, and we request  
2 that Your Honor approve the motion.

3 THE COURT: All right. Other closing arguments?

4 CLOSING ARGUMENT ON BEHALF OF THE UNITED STATES TRUSTEE

5 MS. LAMBERT: Yes, Your Honor. As the Debtor  
6 acknowledges, the Court has no jurisdiction over Strand. This  
7 is a complicated structure. A trustee avoids all of the  
8 complications involved in the Court exercising jurisdiction  
9 over an entity that it doesn't have jurisdiction over.

10 To enter a stock stipulation related to a non-debtor is  
11 highly irregular, and Mr. Dondero is the person behind that.  
12 It has happened in cases where people have been in these kinds  
13 of structures, like that FSLIC used to put in these kinds of  
14 structures -- there's published opinion, the *Goubert*  
15 (phonetic) case -- where the person continued to exercise  
16 control even though they had a stock trust.

17 The Court needs a person beholden to the Court. The  
18 evidence is that, historically, this Debtor has entered into  
19 things that breached its fiduciary duty and resulted in self-  
20 dealing and liability for the Debtor. The evidence is that  
21 these go beyond Mr. Dondero and the Court does not have  
22 jurisdiction over his stock. The Court does not have  
23 jurisdiction over Strand. The board members of Strand are not  
24 employees of the Court, they're employees of Strand, a non-  
25 debtor. These members have a fiduciary duty to Strand.

1 Yes, Strand is the general partner of this Debtor and has  
2 a fiduciary duty, but all these fiduciary duties intermix in  
3 ways that result in conflicts for this case. These conflicts  
4 are unnecessary. The Court could just appoint a trustee who  
5 only owes a fiduciary duty to the members and creditors of  
6 this case, as well as the next (inaudible).

7 There is no evidence that this is cheaper. There is no  
8 evidence that this is a total resolution, because issues are  
9 left open, such as whether or not a CEO is going to be  
10 appointed, how much that person is going to cost.

11 Finally, Your Honor, the sealing has constrained the  
12 ability of some of the parties to understand what's going on  
13 in this case. And that is material to the argument about who  
14 is here, because we don't know who -- that all the people who  
15 would have participated in this discussion had an opportunity  
16 to participate in it.

17 Yes, the creditors have a fiduciary duty, and I believe  
18 that they represented to the best of their ability, but they  
19 are not charged with the issues that others are charged with,  
20 such as the SEC.

21 There is no evidence that the officers are disinterested.  
22 Rather, the new officers are going to be conflicted by the  
23 nature of their position. There's no evidence that it's  
24 cheaper. And a trustee, if appointed, could be appointed on  
25 an hourly basis. This is a Chapter 11 trustee.

1           They argue that the trustee would not have the knowledge,  
2           and yet they've been able to find three candidates to serve  
3           for the board who are qualified. So there's no evidence that  
4           it would not be better to have a trustee for that reason as  
5           well.

6           The evidence is that, historically, the Redeemer Committee  
7           was set up to prevent these kinds of transactions and have  
8           oversight. Historically, the evidence is it did not work.  
9           For this reason, the statute provides a solution, and the  
10          Court should impose it. The Court should deny this motion as  
11          not being in the interest of the estate, as not being a sound  
12          exercise of discretion, because it's really the discretion of  
13          Strand, not the Debtor, and it will remain the discretion of  
14          Strand, not the Debtor.

15          Thank you.

16                THE COURT: All right. Anyone else have comments?

17                MR. POMERANTZ: Your Honor, just a couple of minor  
18          points.

19                THE COURT: Okay.

20                CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

21                MR. POMERANTZ: Ms. Lambert started by saying the  
22          Court doesn't have jurisdiction over Strand. I know I just  
23          handed her the stipulation, but the last paragraph of the  
24          stipulation specifically says that the parties stipulate and  
25          agree that the Court shall have exclusive jurisdiction over

1 all matters arising from or related to the interpretation and  
2 implementation of this stipulation and the adjudication of any  
3 parties breaching the stipulation.

4 So the Court does have jurisdiction now that the  
5 stipulation has been signed, assuming that the Court enters  
6 it, so I think that addresses that issue.

7 Your Honor, the evidence of the disinterestedness of the  
8 members of the board, we've provided their *curriculum vitae*.  
9 We've made representations that they have no connections with  
10 the Debtor or any of the parties in interest. We don't think  
11 that, just because they become appointed and become a director  
12 of Strand, that that renders them disinterested [sic], and we  
13 think that the Trustee's arguments that being at a different  
14 level creates different duties is just not -- is not accurate.  
15 I don't think that the Committee would have had any appetite  
16 for this type of structure had they believed that each of  
17 these board members wouldn't feel that their fiduciary duty  
18 was to the Debtor's estate. And they all are seasoned  
19 restructuring people from different aspects, all understand  
20 their fiduciary duties well, and all are prepared to carry  
21 them out.

22 Lastly, the Trustee points to the historic issues, and  
23 specifically mentioned the Redeemer Committee and that  
24 structure didn't work. Well, I think it speaks volumes, Your  
25 Honor, that not only the Redeemer Committee, are they on the



1 Committee and the Committee has supported this motion, but the  
2 Redeemer Committee hasn't come to Your Honor and said that,  
3 notwithstanding that structure that may or may not have been  
4 effective, this structure is ineffective.

5 And at the end, Your Honor, the Trustee is trying to  
6 replace the business judgment of the Debtor. The Debtor is  
7 entitled to deference of the judgment, again, focusing on the  
8 correct standard. And, again, the Trustee will have her day  
9 in -- his day in court in connection with the ultimate trustee  
10 motion on the 21st.

11 Thank you, Your Honor.

12 THE COURT: Anyone else?

13 All right. Well, the Court is going to note a few things  
14 as part of its ruling, obviously. The new proposed  
15 independent board members for Strand, Strand obviously being  
16 the general partner of the Debtor, Highland -- Mr. James  
17 Seery, Mr. John Dubel, and retired Judge Russ Nelms -- are  
18 highly-qualified individuals with respect to the industry.  
19 Some of them with respect to restructuring. Certainly, in the  
20 case of retired Judge Nelms, with regard to fiduciary duties  
21 and the Bankruptcy Code requirements.

22 These three individuals were chosen by the Creditors'  
23 Committee, whose constituency is broad, whose constituency is  
24 owed well over \$100 million. And they were chosen by the  
25 Committee after literally months of negotiation. Obviously,

1 this bankruptcy was filed in October, and it appears to this  
2 Court, from the representations of counsel, that from the very  
3 beginning of the case -- the Committee was, I guess, appointed  
4 a week or two after the case was filed in October -- there's  
5 been haggling over corporate governance of this Debtor.

6 So we have highly-qualified individuals. We have  
7 individuals who were chosen by the well-constituted Creditors'  
8 Committee. And what has been proposed to the Court is that it  
9 is these independent directors that would have sole and  
10 exclusive management and control of the Debtor.

11 An interesting jurisdictional argument has been made, and  
12 it's one of those arguments that, frankly, you know, sounds  
13 good when you first hear it, but when you really drill down  
14 about the governance structure here, I mean, obviously, this  
15 Debtor is a limited partnership and it acts through a general  
16 partner. It's the general partner that controls the Debtor  
17 entity. And while Strand Advisors, Inc., the general partner,  
18 may not technically be in bankruptcy, it's the structure of  
19 these entities such that it controls the Debtor. So the  
20 jurisdictional argument, when you drill down, feels a little  
21 off.

22 Moreover, we have language in the stipulation where Strand  
23 is stipulating and consenting, if you will, to this Court's  
24 exercise of jurisdiction over it.

25 There are many things about the compromise here that have

1 very compelling appeal. Among them, certainly, the Committee  
2 that's negotiated this term sheet retains the right at any  
3 time to move for a Chapter 11 trustee if it believes there are  
4 grounds. The Committee is granted standing to pursue estate  
5 claims, certain estate claims right off the bat, without  
6 having to come back and ask the Court, without having to rely  
7 on the Debtor to pursue that. There are document production  
8 provisions, document preservation provisions, a shared  
9 privilege negotiated, that are very powerful tools for the  
10 Committee, and certainly operating protocols that have been  
11 negotiated regarding the Debtor's operations that are very  
12 powerful tools for the Committee.

13 I said many times during the *Acis* case -- those who were  
14 here will remember -- that the company, *Acis*, was not a great  
15 fit for Chapter 11. Lots of companies aren't great fits for  
16 Chapter 11, I suppose, but the kind of business it was was  
17 kind of tough to maneuver in Chapter 11. Human beings and  
18 their expertise create value. And while we had a Chapter 11  
19 trustee, a stranger come in and take control over *Acis*, you  
20 know, there's great uncertainty whether that stranger is going  
21 to be able to preserve value and have the smooth transition  
22 into Chapter 11 that's really going to be the best fit.

23 Here, as I've said earlier, the legal standard I view as  
24 controlling here is 363 and whether what has been proposed  
25 reflects reasonable business judgment. Is there a sound

1 business justification for proposing the independent slate of  
2 directors at the GP level for the Debtor, the protocols, the  
3 negotiation with the Committee, the document sharing, the  
4 standing given to them? Does all of this reflect reasonable  
5 business judgment? And I find, quite clearly, it does. I  
6 find it to be a pragmatic solution to the Committee's concerns  
7 about existing management and control.

8 And I think I used the words "fair and equitable," not  
9 just Ms. Lambert, because it is also presented to the Court as  
10 a 9019 compromise of disputes with the Committee, and we  
11 traditionally use a fair and equitable and best interest of  
12 the estate analysis in this context. So, to the extent that  
13 applies, I do find this a fair and equitable way of resolving  
14 the disputes with the Committee, and I find this to be in the  
15 best interest of the estate. So I do approve this.

16 And by approving this motion, I'm approving the term sheet  
17 as it's been presented, the various terms therein, the  
18 exhibits thereto. I'm specifically approving the new  
19 independent directors, the document management and  
20 preservation process, the standing to the Committee over  
21 certain of the estate claims, the reporting requirements, the  
22 operating protocols, the whole bundle of provisions.

23 Now, there is one specific thing I want to say about the  
24 role of Mr. Dondero. When Ms. Patel got up and talked about  
25 the newest language that has been added to the term sheet, she

1 highlighted in particular the very last sentence on Page 2 of  
2 the term sheet, the sentence reading, "Mr. Dondero shall not  
3 cause any related entity to terminate any agreements with the  
4 Debtor." Her statement that that was important, it really  
5 resonated with me, because, you know, as I said earlier, I  
6 can't extract what I learned during the *Acis* case, it's in my  
7 brain, and we did have many moments during the *Acis* case where  
8 the Chapter 11 trustee came in and credibly testified that,  
9 whether it was Mr. Dondero personally or others at Highland,  
10 they were surreptitiously liquidating funds, they were  
11 changing agreements, assigning agreements to others. They  
12 were doing things behind the scenes that were impacting the  
13 value of the Debtor in a bad way.

14 So not only do I think that language is very important,  
15 but I am going to require that language to be put in the  
16 order. Okay? So we're not just going to have an order  
17 approving the term sheet that has that language. I want  
18 language specifically in the order. You know, you can figure  
19 out where the appropriate place to stick it in the order is,  
20 but I want specific language in here regarding Mr. Dondero's  
21 role. I also -- the language in there that his role as an  
22 employee of the Debtor will be subject at all times to the  
23 supervision, direction, and authority of the Debtors, I want  
24 that language in there as well. Let's go ahead and put the  
25 language in there that at any time, in any event, the

1 independent directors can determine he's no longer going to be  
2 retained. I want that in the order.

3 And I'm sure most of you can read my mind why, but I want  
4 it crystal clear that if he violates these terms, he's  
5 violated a federal court order, and contempt will be one of  
6 the tools available to the Court. He needs to understand  
7 that. Mr. Ellington needs to understand that. You know, if  
8 there are any games behind the scene, not only do I expect the  
9 Committee is going to come in and highlight that to the Court  
10 and file a motion for a trustee or whatever, but we're going  
11 to have a contempt of court issue.

12 So, anybody want to respond to that?

13 MR. POMERANTZ: Your Honor, Jeff Pomerantz; Pachulski  
14 Stang Ziehl & Jones.

15 We hear Your Honor. What I thought I'd do now is I have a  
16 clean redline of the order, of course not including the  
17 provision you just requested, --

18 THE COURT: Uh-huh.

19 MR. POMERANTZ: -- which we will go back and upload  
20 and hope to get an order signed by Your Honor today, if you're  
21 around. But to go over the other changes, the changes to  
22 Jefferies, the other language changes I discussed before. I  
23 gave a copy to Ms. Lambert and to the Committee. May I  
24 approach with a --

25 THE COURT: You may.

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1 MR. POMERANTZ: Thank you.

2 THE COURT: Okay. All right. (Pause.) All right.

3 The form of order looks fine to me. Obviously, you'll add the  
4 Dondero-related language, and we may have further wording  
5 tweaks negotiated with the CLO Issuers. But, again, I approve  
6 all of this. I didn't say on the record the compensation, but  
7 certainly I am approving that as reasonable. I expect these  
8 three directors are going to be working very, very hard. And  
9 so, as you said, not 50,000-foot level monitoring, actually  
10 rolling up sleeves on-site, so I think the compensation is  
11 reasonable.

12 MR. POMERANTZ: Thank you, Your Honor. We will  
13 submit an order shortly that includes Your Honor's language  
14 requested.

15 THE COURT: Okay.

16 MR. POMERANTZ: Are you around this afternoon?

17 THE COURT: I am around, --

18 MR. POMERANTZ: Okay.

19 THE COURT: -- so just pick up the phone or send an  
20 email to Traci, my courtroom deputy, --

21 MR. POMERANTZ: Yes.

22 THE COURT: -- so she can tell me, "It's in your  
23 queue to sign."

24 MR. POMERANTZ: She has been extremely helpful and  
25 responsive.

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1 THE COURT: Good. I'm glad to hear that.

2 MR. POMERANTZ: Yes.

3 THE COURT: Now, as far as future scheduling, I did  
4 have her sitting by, listening, in case we needed to discuss  
5 anything. Obviously, we're going to have a kind of a  
6 carryover placeholder on the 21st as part of the trustee  
7 motion hearing for any remaining issues with the CLO Issuer.  
8 And, you know, that's just a placeholder if necessary to hear  
9 language controversies.

10 My courtroom deputy was concerned, because you have a lot  
11 of pending motions that have just sort of sat there pending  
12 because this was the big issue, right? She wants to make sure  
13 she sets anything you need a setting on. And I don't know if  
14 you want to discuss that today or go back as a group and --

15 MR. POMERANTZ: We're happy to -- I think, you know,  
16 I think that's appropriate to do. We had the motion to  
17 appoint the CRO.

18 THE COURT: Uh-huh.

19 MR. POMERANTZ: That was pending. That gets resolved  
20 by this motion. We will submit an order --

21 THE COURT: Okay.

22 MR. POMERANTZ: -- with the new agreement that was  
23 attached to the term sheet.

24 We had the cash management order which Judge Sontchi had  
25 issued an interim order. We will have a final order with



1 respect to that.

2 THE COURT: Okay.

3 MR. POMERANTZ: We will be withdrawing the motion to  
4 approve ordinary course protocols which was originally on for  
5 hearing.

6 THE COURT: Uh-huh.

7 MR. POMERANTZ: I think on the 21st we have currently  
8 set a motion to approve the retention or Mercer, which is the  
9 Debtor's compensation consultant, --

10 THE COURT: Uh-huh.

11 MR. POMERANTZ: -- and an analog motion that was  
12 originally set for today with respect to insiders, non-  
13 insiders, but is on for non-insiders and insiders on the 21st,  
14 --

15 THE COURT: Uh-huh.

16 MR. POMERANTZ: -- which is the motion to approve  
17 bonuses.

18 THE COURT: Uh-huh.

19 MR. POMERANTZ: Of course, the Debtor's new board is  
20 going to be wanting to very carefully review that. And we are  
21 going back and today having our first new board meeting with  
22 the board to start bringing them up to speed. But we  
23 presently intend, subject to, obviously, their direction, to  
24 go forward on the 21st.

25 We also have the retention of Lynn Pinker and Foley

1 Gardere, which had been filed and was brought on for hearing  
2 previously. It had been delayed, again, for the board to look  
3 at the issues. We expect to have that on for the 21st. And I  
4 believe, I believe that would be it.

5 MS. LAMBERT: No, Your Honor, the --

6 MR. POMERANTZ: No?

7 MS. LAMBERT: -- U.S. Trustee has objected to the  
8 motion to seal, which was the second item on the Wilmington  
9 Court's docket that got -- and it got transferred here. The  
10 U.S. Trustee has also objected to the motion for protective  
11 order. The issues overlap. We request that they be set as  
12 quickly as possible.

13 MR. POMERANTZ: We're happy to set both of those for  
14 the 21st as well.

15 THE COURT: All right. So I think what I'm going to  
16 ask you to do is just get on the phone, one of you, with Traci  
17 and just make sure she's clear on everything you need set on  
18 the 21st, and then you can do a big notice of hearing, just  
19 kind of listing all of these matters.

20 MR. POMERANTZ: Your Honor, with respect to the CRO  
21 motion -- order and the cash management order, I was wondering  
22 if it would be helpful for my colleague Mr. Demo to go over  
23 the amendments to those orders -- we would like those to be  
24 entered today -- to see if Your Honor has any questions.

25 THE COURT: All right. That would be good. Mr.

1 Clemente, did you have something first?

2 MR. CLEMENTE: Just very quickly, Your Honor. We had  
3 filed our retention applications for the Committee  
4 professionals and filed CNOs, and your office had indicated  
5 you wanted to get through today, which I totally understand,  
6 but I just wanted to make sure that Your Honor didn't lose  
7 sight of those. I don't believe there were any objections to  
8 those, but I think your intent was probably to deal with them  
9 after today, but I just wanted to --

10 THE COURT: All right. Yes, it was to get through  
11 today.

12 MR. CLEMENTE: Yes.

13 THE COURT: So, since you've had plenty of time run  
14 on those, you can submit orders and I'll get them signed in  
15 chambers.

16 MR. CLEMENTE: Thank you very much, Your Honor.  
17 Appreciate it.

18 THE COURT: Okay. Thank you. Counsel?

19 MR. DEMO: Good afternoon, Your Honor. Greg Demo,  
20 Pachulski Stang, on behalf of the Debtor. I'm happy to keep  
21 this as brief as possible, but I think walking through the  
22 cash management motion has the most changes.

23 THE COURT: Okay.

24 MR. DEMO: The biggest change there, and we had  
25 discussed this with the United Stated Trustee in Delaware, is

1 that in our initial motion we disclosed that the Debtor had  
2 bank accounts at BBVA and then also at NexBank. Those  
3 accounts have been moved to East West Bank, --

4 THE COURT: Okay.

5 MR. DEMO: -- which is a party to a depository  
6 agreement with the United States Trustee.

7 THE COURT: Okay.

8 MR. DEMO: The only exception to that is a  
9 certificate of deposit that is at NexBank. It's a relatively  
10 small amount of money. It's \$135,000. But it also is pledged  
11 as collateral on a lease. So that has been -- proven  
12 problematic to move. The Trustee for Delaware did say that  
13 was okay. I would hope that the Trustee for Texas would agree  
14 with that. We did disclose it in the initial debtor  
15 interview.

16 But those are the bank accounts. The bank accounts at  
17 BBVA and NexBank, with the exception of that CD, were all  
18 closed as of yesterday.

19 THE COURT: Okay.

20 MR. DEMO: So now we are going to be using East West  
21 Bank for all operating accounts, all cash, going forward.

22 The other two accounts are the account at Jefferies, which  
23 is the prime brokerage account.

24 THE COURT: Uh-huh.

25 MR. DEMO: That account, we are keeping open.

1 Obviously, there have been conversations with Jefferies that  
2 are going to be reflected in the proposed order on the  
3 settlement, but we do propose to keep the Jefferies prime  
4 brokerage account open as well.

5 And then we filed a supplement for another prime brokerage  
6 account that we have at a prime broker called Maxim Group.  
7 That account has \$30 million in securities in it, give or  
8 take, and then literally like \$100 in cash. The Debtor  
9 considers that account more an investment than actual  
10 operating account, but we would like to keep that account open  
11 as well, just so it can continue holding those securities.

12 Jefferies and Maxim, neither of them are on the depository  
13 list, so we are requesting a waiver of 345(b) for those two  
14 accounts, and then also requesting a waiver of 345(b) with  
15 respect to the certificate of deposit at NexBank.

16 THE COURT: Okay.

17 MR. DEMO: That's where we're at at cash management.  
18 And I guess, sorry, one more thing. In the original cash  
19 management motion, we had a series of intercompany  
20 transactions that we disclosed, and we had gotten interim  
21 relief from the Delaware court to make those payments up to a  
22 hundred -- or, \$1.7 million. We are below that account, and  
23 on a go-forward basis, all of those intercompany transactions  
24 are getting subsumed into the settlement motion and the  
25 operating protocols and all of that. But we are asking for

1 final relief on the intercompany transactions that we made  
2 under the interim order.

3 THE COURT: Okay. All right. Who wishes to be heard  
4 on this? I don't know how much discussion we've had outside  
5 the courtroom on this.

6 MS. LAMBERT: We haven't -- normally, a bond would be  
7 appropriate for the Jefferies and the other small account.  
8 The estate is at risk on the CD, but it's not that much money.  
9 It's not worth bonding. It'll be more expensive to bond it.

10 NexBank, as you know, Your Honor, is a bank where Mr.  
11 Dondero is the CEO. So that was part of the reason that  
12 NexBank was carved out. But the -- so I would like them to  
13 bid bonds on the Jefferies and the other account. And if we  
14 -- let's carry it on those issues so that we can see how  
15 expensive bonding it would be, and if it's cost-prohibitive,  
16 maybe we reconsider. But in the past, the bonds haven't been  
17 very expensive, relatively.

18 MR. DEMO: We're happy to discuss that with the U.S.  
19 Trustee. I mean, just for the record, the Jefferies account,  
20 you know, does support a margin loan. It's \$80 million in  
21 securities. It's \$30 million at Maxim. They're SIPC. I  
22 mean, it's Jefferies and, you know, another large prime  
23 broker. Again, we're happy to discuss it with the Trustee. I  
24 don't know that it's necessary, but we will discuss it.

25 THE COURT: Okay. Well, you all can discuss it, and

1 if you have an unopposed order, an agreed order, --

2 MR. DEMO: Uh-huh.

3 THE COURT: -- you can upload it and I'll sign it.

4 Otherwise, if you need hearing time on the 21st, --

5 MR. DEMO: Okay.

6 THE COURT: -- we'll get it all figured out then and

7 --

8 MR. DEMO: Okay. All right.

9 THE COURT: -- resolve it then.

10 MR. DEMO: Thank you, Your Honor. And then I guess  
11 the other motion is the CRO retention. This one should  
12 hopefully be pretty brief. We are just filing a new proposed  
13 order that attaches the engagement letter, as has been  
14 modified by all of the settlement discussions. I believe the  
15 Committee is on board with that, and it's consistent. It was  
16 one of the attachments that you approved this morning in  
17 connection with the settlement.

18 THE COURT: All right. Comments on that?

19 A VOICE: None, Your Honor.

20 THE COURT: Committee, you're good?

21 MS. LAMBERT: The U.S. Trustee had also objected to  
22 the CRO motion, but it's some of the same issues that the  
23 Committee raised. And the CRO, my understanding, is now not  
24 an employee of the board but totally overseen by the board,  
25 and with that, we can withdraw our objection.

90

1 THE COURT: All right. Very good. I'll sign your  
2 order on the CRO, then.

3 MR. DEMO: Okay. Thank you, Your Honor.

4 THE COURT: All right. Well, if there's nothing  
5 else, I'll be on the lookout for your orders. And, again, if  
6 you could coordinate with Traci to make sure she's clear on  
7 everything you need set on the 21st.

8 MR. POMERANTZ: Thank you very much, Your Honor.

9 THE COURT: All right.

10 MR. CLEMENTE: Thank you, Your Honor.

11 MR. DEMO: Thank you, Your Honor.

12 THE CLERK: All rise.

13 (Proceedings concluded at 11:54 a.m.)

14 --oOo--

15

16

17

18

19

20

CERTIFICATE

21 I certify that the foregoing is a correct transcript from  
22 the electronic sound recording of the proceedings in the  
above-entitled matter.

23 **/s/ Kathy Rehling**

**12/10/2020**

24

25 Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

Date



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## EXHIBIT 24

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

In Re: ) **Case No. 19-34054-sgj-11**  
)   
)   
HIGHLAND CAPITAL ) Dallas, Texas  
MANAGEMENT, L.P., ) February 19, 2020  
) 9:30 a.m.  
Debtor. )   
) MOTIONS  
)   
\_\_\_\_\_ )

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Debtor: Greg Demo  
John A. Morris  
PACHULSKI STANG ZIEHL & JONES, LLP  
780 Third Avenue, 34th Floor  
New York, NY 10017-2024  
(212) 561-7700

For the Debtor: Jeffrey N. Pomerantz  
PACHULSKI STANG ZIEHL & JONES, LLP  
10100 Santa Monica Blvd., 13th  
Floor  
Los Angeles, CA 90067  
(310) 277-6910

For the Debtor: Melissa S. Hayward  
Zachery Z. Annable  
HAYWARD & ASSOCIATES, PLLC  
10501 N. Central Expressway,  
Suite 106  
Dallas, TX 75231  
(972) 755-7104

For the Official Committee of Unsecured Creditors: Matthew A. Clemente  
SIDLEY AUSTIN, LLP  
One South Dearborn Street  
Chicago, IL 60603  
(312) 853-7539

1 APPEARANCES, cont'd.:

2 For the Official Committee of Unsecured Creditors: Juliana Hoffman  
3 SIDLEY AUSTIN, LLP  
4 2021 McKinney Avenue, Suite 2000  
5 Dallas, TX 75201  
6 (214) 981-3413

7 For Acis Capital Management GP, LLC, et al.: Rakhee V. Patel  
8 Annmarie Antoinette Chiarello  
9 Phillip L. Lamberson  
10 WINSTEAD, P.C.  
11 2728 N. Harwood Street, Suite 500  
12 Dallas, TX 75201  
13 (214) 745-5250

14 For Acis Capital Management GP, LLC, et al.: Brian Patrick Shaw  
15 ROGGE DUNN GROUP, P.C.  
16 500 N. Akard Street, Suite 1900  
17 Dallas, TX 75201  
18 (214) 239-2707

19 For the Issuer Group: Amy K. Anderson  
20 JONES WALKER, LLP  
21 811 Main Street, Suite 2900  
22 Houston, TX 77002  
23 (713) 437-1866

24 For the Issuer Group: James T. Bentley  
25 (Telephonic) SCHULTE ROTH & ZABEL, LLP  
919 Third Avenue  
New York, NY 10022  
(212) 756-2000

For Redeemer Committee of the Highland Crusader Fund: Mark A. Platt  
FROST BROWN TODD, LLC  
100 Crescent Court, Suite 350  
Dallas, TX 75201  
(214) 580-5852

For Redeemer Committee of the Highland Crusader Fund: Marc B. Hankin  
(Telephonic) JENNER & BLOCK, LLP  
919 Third Avenue  
New York, NY 10022-3098  
(212) 891-1600

1 APPEARANCES, cont'd.:

2 For the U.S. Trustee: Lisa L. Lambert  
3 OFFICE OF THE UNITED STATES  
4 TRUSTEE  
5 1100 Commerce Street, Room 976  
6 Dallas, TX 75242  
7 (214) 767-8967 Ext. 1080

8 Recorded by: Michael F. Edmond  
9 UNITED STATES BANKRUPTCY COURT  
10 1100 Commerce Street, 12th Floor  
11 Dallas, TX 75242  
12 (214) 753-2062

13 Transcribed by: Kathy Rehling  
14 311 Paradise Cove  
15 Shady Shores, TX 76208  
16 (972) 786-3063  
17  
18  
19  
20  
21  
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25 Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

1 DALLAS, TEXAS - FEBRUARY 19, 2020 - 9:43 A.M.

2 THE COURT: All right. Well, we have Highland  
3 matters. Let's get lawyer appearances, in the courtroom  
4 first.

5 MR. DEMO: Good morning, Your Honor. Greg Demo;  
6 Pachulski Stang Ziehl & Jones, on behalf of the Debtor. With  
7 me are Jeff Pomerantz and John Morris.

8 THE COURT: Okay. Good morning.

9 MR. POMERANTZ: Good morning.

10 MR. CLEMENTE: Good morning, Your Honor. Matthew  
11 Clemente and Juliana Hoffman from Sidley Austin on behalf of  
12 the Official Committee of Unsecured Creditors.

13 THE COURT: Good morning.

14 MS. HAYWARD: Good morning, Your Honor. Melissa  
15 Hayward and Zachery Annable also on behalf of the Debtor.

16 THE COURT: Good morning.

17 MS. LAMBERT: Lisa Lambert with the U.S. Department  
18 of Justice on behalf of the U.S. Trustee, William Neary.

19 THE COURT: Good morning.

20 MS. PATEL: Good morning, Your Honor. Rakhee Patel,  
21 Phil Lamberson, and Annemarie Chiarello of Winstead, P.C., and  
22 also Brian Shaw of Rogge Dunn Group, on behalf of Acis Capital  
23 Management, LP and Acis Capital Management, GP, LLC.

24 THE COURT: Thank you.

25 MR. PLATT: Good morning, Your Honor. Mark Platt

5

1 from Frost Brown Todd on behalf of the Redeemer Committee of  
2 the Highland Crusader Fund. I believe that at least Marc  
3 Hankin from Jenner & Block is on the line as well.

4 THE COURT: Okay. Thank you.

5 MS. ANDERSON: Good morning, Your Honor. Amy  
6 Anderson with Jones Walker on behalf of the Issuers. And I  
7 believe Mr. James Bentley with Schulte Roth is also on the  
8 phone.

9 And I apologize for interrupting the flow. I would ask if  
10 Mr. Bentley and I could be excused after the uncontested  
11 matters are taken up this morning, just to avoid --

12 THE COURT: Okay.

13 MS. ANDERSON: -- having us -- I don't want to re-  
14 interrupt later, if that is all right with Your Honor.

15 THE COURT: Okay. That's fine. Thank you.

16 MS. ANDERSON: Okay.

17 THE COURT: All right. That looks like all the  
18 courtroom appearances. On the phone, we heard that James  
19 Bentley is there. Do you want to appear, Mr. Bentley?

20 MR. BENTLEY: Yes, that's correct, Your Honor. Good  
21 morning.

22 THE COURT: All right.

23 MR. BENTLEY: Good morning, Your Honor. James  
24 Bentley; Schulte Roth & Zabel; for the Cayman Issuers.

25 THE COURT: All right. And someone else was there

6

1 for the Redeemer Fund. I can't remember. Was it Mr. Clubok  
2 you said, or anyone else on the phone?

3 MR. HANKIN: Marc Hankin from Jenner & Block, --

4 THE COURT: Oh, okay.

5 MR. HANKIN: -- Your Honor.

6 THE COURT: All right. Mr. Hankin. Anyone else on  
7 the phone who wants to appear may go ahead.

8 All right. I guess we're good to go. Well, I'll turn now  
9 -- Mr. Demo, are you going to start us off today?

10 MR. DEMO: Yes, Your Honor.

11 THE COURT: Someone delivered a wonderful notebook  
12 and an easy-to-follow agenda. I appreciate whosever hard work  
13 was behind that. It really helps us get prepared back in  
14 chambers. So, thank you.

15 MR. DEMO: And we're happy to do it, Your Honor,  
16 because, honestly, it helps us, I think, as much as it helps  
17 you.

18 THE COURT: Okay.

19 MR. DEMO: And we do have extra copies if anybody  
20 needs a copy of the agenda.

21 THE COURT: Okay.

22 MR. DEMO: Generally speaking, we'd kind of like to  
23 go in the order of the agenda, I think, with two exceptions.  
24 I know that Ms. Adams and Mr. Bentley have to move, so I  
25 thought maybe we could do their objection to the settlement



1 motion first.

2 THE COURT: Okay. So that's the carryover matter.

3 MR. DEMO: Correct, Your Honor.

4 THE COURT: We obviously have an order in place, but  
5 we kept it open to accommodate their issues.

6 MR. DEMO: Correct.

7 THE COURT: Okay.

8 MR. DEMO: And that's Item 7 on Page 7.

9 THE COURT: All right.

10 MR. DEMO: And I think this one -- and anybody can  
11 correct if I'm wrong -- will go pretty easily. We've come to  
12 an agreement with the Objecting Parties.

13 THE COURT: All right.

14 MR. DEMO: We are planning on submitting, under a  
15 notice, a revised copy of the operating protocols that were  
16 approved by this Court in connection with the settlement that  
17 addresses those Objectors' concerns. And then once that is  
18 filed, the Objecting Parties will withdraw their objection.

19 THE COURT: All right. Anyone wish to speak up on  
20 this matter?

21 All right. Well, as I recall, the concern had been that  
22 they didn't want the agreed-upon operating protocols with the  
23 Committee to somehow change contractual rights of the parties,  
24 and so --

25 MR. DEMO: That is correct, Your Honor. And we took

1 their language and we carved out a small universe of CLO  
2 Issuers, --

3 THE COURT: Okay.

4 MR. DEMO: -- exactly as they asked for.

5 THE COURT: All right. Well, again, I'll ask: Does  
6 anyone have any comment about this revised process?

7 All right. Well, that sounds perfectly fine to me, so  
8 we'll look for the revised copy of the operational procedures.

9 MR. DEMO: Okay. Great, Your Honor.

10 And then I guess the only other exception to the order of  
11 the agenda --

12 (Garbled phone noises.)

13 THE COURT: Is someone on the phone wishing to speak  
14 up? (no response) All right. I guess not.

15 MR. DEMO: Yeah. I guess the only other exception to  
16 the order in the agenda is the Foley Gardere retention  
17 application.

18 THE COURT: Okay.

19 MR. DEMO: We would like to do that last. It is a  
20 contested hearing and I think we are going to have some  
21 evidence on that.

22 THE COURT: All right. All right. Sounds fine.

23 MR. DEMO: Then, I guess, just going through the  
24 agenda in the order that it's written, the first one is the  
25 Lynn Pinker retention application. We had originally filed

1 that retention application back in October. We recently  
2 withdrew it. We're not going to go forward on it.

3 THE COURT: All right.

4 MR. DEMO: The second matter, and I guess the second  
5 two matters, hopefully, we can take at the same time. These  
6 are two uncontested matters. Certificates of no objection  
7 have been filed for both of them. The first is the foreign  
8 representative motion.

9 THE COURT: Yeah, and I will tell you, I don't know  
10 if it's shown up on PACER yet, --

11 MR. DEMO: Okay.

12 THE COURT: -- but I actually already signed an order  
13 on that, --

14 MR. DEMO: Okay.

15 THE COURT: -- as well as exclusivity.

16 MR. DEMO: Perfect.

17 THE COURT: But, you know, I saw the certificates of  
18 no objection, but perhaps we need to talk about it in case  
19 anyone wants to comment in any way.

20 MR. DEMO: If anybody does, I mean, if you've already  
21 entered them -- I know PACER was down, so I don't think we've  
22 seen it yet.

23 THE COURT: Okay.

24 MR. DEMO: But we're fine moving on if --

25 THE COURT: Well, yeah. The foreign representative

10

1 motion looked like a no-brainer, if you will.

2 MR. DEMO: Uh-huh.

3 THE COURT: It was filed way back in October, right?

4 MR. DEMO: Correct. Right.

5 THE COURT: And no one had ever objected. It's just  
6 that there are some foreign proceedings out there; --

7 MR. DEMO: Right. Right.

8 THE COURT: -- you wanted to make sure that there was  
9 a human being who had authority to act in those?

10 MR. DEMO: Correct.

11 THE COURT: All right. So, if no one has any  
12 comment, I did go ahead and sign the order approving that.

13 MR. DEMO: Okay.

14 THE COURT: Similarly, exclusivity. I signed an  
15 order on that yesterday. In probably nine out of ten cases, I  
16 would have had a hearing with evidence.

17 MR. DEMO: Uh-huh.

18 THE COURT: But, again, that one seemed like a no-  
19 brainer. We had no objections, and obviously you've been in  
20 court a lot, with a lot of things happening.

21 MR. DEMO: Yes.

22 THE COURT: So it seemed like a no-brainer to give  
23 more time on that. So, does anyone have anything they wanted  
24 to say about that? (no response) All right.

25 MR. DEMO: Okay.

11

1 THE COURT: So that is granted. I can't remember,  
2 off the top of my brain, what the extended time frame was. Do  
3 you want to say that on the record? Because I've just blanked  
4 out at the moment.

5 (Counsel confer.)

6 MR. DEMO: It's -- we extended it for four months,  
7 Your Honor.

8 THE COURT: Okay. All right. So that was June, June  
9 12th as the deadline for filing a plan, and then the  
10 solicitation period would expire on August 11th, 2020. That's  
11 what I've approved.

12 MR. DEMO: Yes.

13 THE COURT: All right.

14 MR. DEMO: Okay. The next matter is the bar date  
15 motion. There was an automatic bar date set for April 8th --

16 THE COURT: Uh-huh.

17 MR. DEMO: -- in connection with the 341 notice. We  
18 just wanted to have procedures for filing claims approved by  
19 this Court.

20 THE COURT: Okay.

21 MR. DEMO: You know, we filed the motion. There are  
22 no objections. We did have some comments from the United  
23 States Trustee, which we've incorporated into a redlined  
24 order.

25 Something came up last night where, the way that it works

12

1 because we have a lot of investors, is that a lot of people  
2 get notice through their custodians and through the different  
3 administrators.

4 THE COURT: Uh-huh.

5 MR. DEMO: And so we worked that into the motion.  
6 The United States Trustee has asked for an extension of 45  
7 days for those folks to file their claim. We're okay with  
8 that. We're going to work with her afterwards, and we will  
9 submit a revised form of order.

10 THE COURT: Okay. So, just to be clear, the proposed  
11 deadlines, as revised, would be what?

12 MR. DEMO: It depends on when the notice is actually  
13 able to be sent out.

14 THE COURT: Okay.

15 MR. DEMO: We need to work through some technical  
16 issues on that.

17 THE COURT: Okay. Ms. Lambert?

18 MS. LAMBERT: So, Judge Jernigan, I think the Court  
19 is familiar with this from when we solicit Equity Committees.  
20 It's the same issue here. You go to TD Ameritrade and then  
21 they send the notice to the direct holders, but also asked  
22 that they include correspondence to the TD Ameritrade or  
23 Merrill Lynch equivalents saying -- instructing them to send  
24 the notice of the bar date to their direct holders.

25 So we're going to agree on the phrasing of the letter.

1 I'm hopeful that we can attach that to the order so the Court  
2 can see what it looks like.

3 THE COURT: All right.

4 MR. DEMO: Okay. And we'll work through those  
5 issues, Your Honor, and have something to you as soon as  
6 possible.

7 THE COURT: All right. And you're also asking for  
8 bar dates, really, bar date for 503(b)(9) claims as well?

9 MR. DEMO: Yeah. We don't think we're going to have  
10 any.

11 THE COURT: Okay.

12 MR. DEMO: So it's really just out of an abundance of  
13 caution.

14 THE COURT: Okay. All right. Well, I'll look for  
15 that form of order --

16 MR. DEMO: Okay.

17 THE COURT: -- and be happy to sign it as you all  
18 have negotiated it.

19 MR. DEMO: Okay. And then skipping over Foley  
20 Gardere, there is one still outstanding objection on that, so  
21 we will hear that in due course.

22 THE COURT: Okay.

23 MR. DEMO: The next one is Item 6 on Page 6, and  
24 that's the PensionDanmark motion to lift the stay. We have an  
25 agreement in principle with PensionDanmark that the Committee

14

1 has signed off on. We're just going through and working  
2 through the paperwork. And so we would like to just push this  
3 to the next hearing date, with the expectation that we would  
4 get the paperwork filed in between then and we wouldn't have  
5 to have it set.

6 THE COURT: All right. So we will carry this to our  
7 next omnibus hearing date. I don't know if we have one  
8 automatically set at this point or --

9 MR DEMO: It's March 13th.

10 THE COURT: March--?

11 MR. DEMO: 12th.

12 MS. HAYWARD: 11th.

13 MR. DEMO: 11th. I'm sorry. I was in the ballpark.

14 THE COURT: Okay. So, carried to March 11th, as  
15 necessary.

16 MR. DEMO: Uh-huh.

17 THE COURT: All right.

18 MR. DEMO: And then I guess the next thing, skipping  
19 over the CLO Issuers' objection, which we already addressed,

20 --

21 THE COURT: Uh-huh.

22 MR. DEMO: -- is the sealing conference motion.

23 THE COURT: Okay.

24 MR. DEMO: And I would turn this over to my  
25 colleague, John Morris.



1 THE COURT: All right.

2 MR. MORRIS: Good morning, Your Honor. John Morris,  
3 Pachulski Stang Ziehl & Jones.

4 THE COURT: Good morning.

5 MR. MORRIS: I hope that this doesn't take too much  
6 time. But following the last hearing that we had, the Court  
7 had rendered a ruling with respect to the Committee's sealing  
8 motion. And regrettably, the Debtor and the U.S. Trustee's  
9 Office were unable to agree on a form of order. And that led  
10 to kind of a back-and-forth about the scope of the protective  
11 order that had been entered.

12 So, because we couldn't come to an agreement, and because  
13 the Debtor had concerns about the interpretation and the  
14 position, frankly, that the U.S. Trustee was taking with  
15 respect to the protective order, we filed our motion for the  
16 entry of an order concerning the sealing motion and for a  
17 conference. And that was filed at Docket 397.

18 The Court subsequently entered the Debtor's proposed order  
19 on the sealing motion, on the Committee's sealing motion. So  
20 that's moot.

21 The only issue, to the extent there is an issue, and I'm  
22 not sure that there is, but to the extent that there is an  
23 issue, it was just the Debtor's desire to make clear on the  
24 record that the words of the protective order are clear and  
25 unambiguous and that they apply to any party who receives

1 documents in this bankruptcy case, whether it's in connection  
2 with a contested matter or an adversary proceeding, and that  
3 order applies both to documents previously received and to  
4 documents that will be received in the future.

5 We had asked the U.S. Trustee's Office to make -- just to  
6 agree that they would abide by the protective order. And I'm  
7 not casting aspersions, I'm not saying, you know, they're bad  
8 people or anything, but we never got the crystal-clear  
9 response that we needed and expected, frankly, that the order  
10 says what the order says and the U.S. Trustee's Office would,  
11 you know, would abide by it.

12 THE COURT: Okay. So, --

13 MR. MORRIS: So that's why we asked for this status  
14 conference.

15 THE COURT: So this is more than just the issue of  
16 the Redeemer Committee arbitration award --

17 MR. MORRIS: Correct.

18 THE COURT: -- that was the attachment to the --

19 MS. LAMBERT: No, Your Honor.

20 THE COURT: Wait. Oh, okay. Well, what I was about  
21 to say is I was understanding from your presentation that you  
22 thought this was about more than just the arbitration award,  
23 the Redeemer Committee arbitration award that had been  
24 attached to that Committee objection and that was subject to  
25 the motion to seal.

1           You think it is also about items marked Confidential that  
2 the U.S. Trustee received before the entry of the protective  
3 order?

4           MR. MORRIS: As it explicitly provides for. And I'll  
5 just say that the concerns arise from the written  
6 communications that we received, where the U.S. Trustee's  
7 Office specifically said that they would file matters  
8 unredacted and without seal. And we asked them to simply  
9 retract that statement, because the order says what the order  
10 says. And I think it's a fair concern that the Debtor has in  
11 this regard, and it was really a very simple request. Please,  
12 please, I mean, you can't file documents unredacted and  
13 without seal because there's a protective order in place.

14           THE COURT: Okay. Now, Ms. Lambert, you say -- what  
15 were you about to say?

16           MS. LAMBERT: First, Your Honor, I want to be clear  
17 that the U.S. Trustee -- everyone in the U.S. Trustee's Office  
18 intends to honor the Court's orders. There are many things  
19 that we debate hotly and that we feel animated about in terms  
20 of legal advocacy, but we intend to honor both the office and  
21 the individual that holds that office when the Court has made  
22 a ruling.

23           The issue that is presented to the Court is what is the  
24 effect of dismissing a motion to seal on the basis that it is  
25 moot? There's black-letter law that sealing should be for

1 limited time periods and things should be unsealed --

2 THE COURT: Okay. Can I stop you? Are you saying  
3 that you think the sole issue here is just the arbitration  
4 award?

5 MS. LAMBERT: Yes, Your Honor.

6 THE COURT: Okay. So, so --

7 MS. LAMBERT: And this is how it springs back to the  
8 protective order.

9 THE COURT: Okay. Let me --

10 MS. LAMBERT: The U.S. --

11 THE COURT: Let me stop you, because what about other  
12 documents besides the arbitration award that the U.S. Trustee  
13 might have received prior to the Court signing the protective  
14 order?

15 MS. LAMBERT: The U.S. Trustee did not receive any  
16 other items that --

17 THE COURT: Okay. So we are just talking about the  
18 arbitration?

19 MS. LAMBERT: We have not to this date received any  
20 other items than those items --

21 THE COURT: Okay.

22 MS. LAMBERT: -- that were subject to the motion to  
23 seal.

24 THE COURT: Okay.

25 MS. LAMBERT: And this is the U.S. Trustee's

1 position. The Court --

2 THE COURT: I will say that one of the Debtor's  
3 lawyers is shaking his head. I want to see if there's a  
4 disagreement about, did the U.S. Trustee receive more items?  
5 Was that --

6 MR. MORRIS: I would say, Your Honor, I don't know  
7 exactly what was delivered, because I'm, --

8 THE COURT: Okay.

9 MR. MORRIS: -- right, I'm part of a team. But I do  
10 know that we gave, for example, information about bonus --  
11 about, you know, personnel bonus motions that is confidential.

12 MS. LAMBERT: But the issue about what was going to  
13 be filed unsealed was related to the items in the motion to  
14 seal and the U.S. Trustee's attendant motion for the  
15 appointment of a Chapter 11 Trustee, which had been redacted.

16 THE COURT: Okay. Let me -- I'm going to take a shot  
17 at making this go quicker. What I meant when I ruled that,  
18 well, the objection of the Committee is moot now because it  
19 was resolved by other orders; therefore, I think the motion to  
20 file under seal the arbitration award is moot because it was  
21 connected to the Committee's objection; you know, that was a  
22 quick, off-the-cuff comment. What I was trying to say is I  
23 didn't think this needed any more court time. There was no  
24 case in controversy anymore. I didn't know why I needed to  
25 resolve an objection to the motion to file under seal.

1           What I meant is it's going to be like it never even  
2 happened, right? And what I probably should have done is  
3 said, Committee, you want to make an oral motion to withdraw  
4 your objection and withdraw your motion to seal, you know,  
5 orally, I'll grant it orally and just remove it from the  
6 record, so to speak.

7           And I thought we were passing off to another day whether  
8 that arbitration award, if someone wanted to file it and file  
9 it publicly or disclose it, they could then file a motion  
10 later.

11           MR. MORRIS: Your Honor?

12           MS. LAMBERT: Here's the -- here's the --

13           MR. MORRIS: Your Honor, if I may?

14           THE COURT: Uh-huh.

15           MR. MORRIS: You've done exactly what you've said.

16           THE COURT: Okay.

17           MR. MORRIS: I don't think there is an issue now.

18           THE COURT: Okay.

19           MR. MORRIS: I've heard from the U.S. Trustee's  
20 Office what I asked for probably three times in writing, that  
21 they are going to abide by the terms of the protective order.  
22 With respect to the sealing order, Your Honor has entered an  
23 order. It declared the Committee's motion to seal moot, and  
24 it specifically provided that anybody who's received the  
25 awards has to treat them in accordance with the protective

1 order.

2 THE COURT: Yeah.

3 MR. MORRIS: Nobody's appealed that order.

4 THE COURT: Okay.

5 MR. MORRIS: It's now the -- it's -- whatever the  
6 U.S. Trustee's interpretation is of the law is kind of  
7 irrelevant at this point because the order has been entered  
8 and it hasn't been appealed.

9 THE COURT: Okay.

10 MS. LAMBERT: Here's the thing, Your Honor. The case  
11 law, *Omni Video*, similar things. There are two issues.  
12 Number one is whether the mootness of the underlying issue  
13 means that the pleadings should be unredacted, which is black  
14 letter that at some point pleadings should be unredacted and  
15 made available to the public. And the Court's ruling is that  
16 by replacing the management the Court has mooted anything that  
17 might be scandalous about that or that might be problematic  
18 about it, and therefore --

19 THE COURT: What is the it? I'm not following.

20 MS. LAMBERT: -- the arbitration award and the  
21 pleadings attendant were redacted, but the --

22 THE COURT: I haven't said anything about -- I mean,  
23 I denied a Chapter 11 trustee motion because I thought the new  
24 management was a correct way to go forward in this case.

25 MS. LAMBERT: Correct.

1 THE COURT: The arbitration award, what I meant was  
2 it's like it never happened now. And if I --

3 MS. LAMBERT: Right.

4 THE COURT: -- need to do an amended order saying the  
5 Committee has permission to withdraw the objection and  
6 withdraw the motion to seal, I'll --

7 MS. LAMBERT: That's --

8 THE COURT: -- I'll do that, --

9 MS. LAMBERT: But --

10 THE COURT: -- so there's nothing on the record to  
11 make public.

12 MS. LAMBERT: But withdrawing the motion, objection,  
13 does not delete it from the record, Your Honor.

14 THE COURT: Well, I'm going to make it so. I'm going  
15 to make it so. And then if, one day, you or someone else --

16 MS. LAMBERT: Your Honor, currently, --

17 THE COURT: -- wants to be relieved from the  
18 protective order and asks that it be publicly filed, I'll  
19 consider --

20 MS. LAMBERT: Your Honor?

21 THE COURT: -- the merits of that.

22 MS. LAMBERT: Your Honor, the thing is that the  
23 Committee, when it filed its original objection, did not  
24 redact. So this information has been in the public domain for  
25 months now. And the arbitration --



1 THE COURT: Wait. Okay. This all happened in  
2 Delaware, so I don't know their procedure. Are you saying it  
3 was on the public PACER?

4 MS. LAMBERT: They didn't redact.

5 MR. MORRIS: No. Your Honor, the Redeemer Award  
6 (inaudible). The order says what the order says. It's been  
7 entered. I mean, this is the concern, is that we have this  
8 never-ending debate. I've heard -- the Debtor has heard what  
9 it needed to hear, and that is the U.S. Trustee's Office will  
10 abide by the terms of the protective order.

11 With respect to the Committee's motion to seal, we're done  
12 with that.

13 MS. LAMBERT: There is no --

14 MR. MORRIS: An order has been entered.

15 MS. LAMBERT: There is no motion to seal. The normal  
16 effect of -- the dismissal of a motion to seal on the basis  
17 that it is moot is that everything attendant to that becomes  
18 unredacted and unsealed.

19 In addition, there's a separate issue that the Debtor gets  
20 to talk about what the amounts in the Redeemer awards were  
21 unilaterally, without -- and the Committee gets to talk about  
22 it unilaterally. They've mentioned what the findings were in  
23 four different spots in their objection that are not redacted.  
24 And the U.S. Trustee is the only one that's held to the motion  
25 to seal, which we have honored, but the --

1 THE COURT: I don't understand why we're having this  
2 discussion. For now, I've made it a moot issue, a dead issue.  
3 The objection to which the arbitration award was attached as  
4 an exhibit became moot. Maybe I'm not using the best legal  
5 description, but it was resolved. And I didn't feel the need  
6 for us to have a dispute about whether that motion to seal,  
7 which related to the objection --

8 MS. LAMBERT: The motion to seal --

9 THE COURT: -- was meritorious or not. If -- again,  
10 --

11 MS. LAMBERT: But the motion to --

12 THE COURT: -- to me, there's an easy fix. If you're  
13 -- if you think it's necessary, I'll grant the --

14 MR. MORRIS: Your Honor?

15 THE COURT: This seems like wasted energy, --

16 MS. LAMBERT: But --

17 THE COURT: -- granting the Committee authority to  
18 withdraw their objection and their motion to seal --

19 MS. LAMBERT: But, Your Honor, --

20 THE COURT: -- so that it's off the record.

21 MS. LAMBERT: -- the interim sealing order didn't  
22 impact just their objection. It impacted the U.S. Trustee's  
23 motion to dismiss. It impacted the evidence. The finding  
24 that these issues are moot because they're resolved means that  
25 the Court should unredact them because it's no longer

25

1 confidential. It's no longer a problem. If the evidence is  
2 --

3 THE COURT: Why are we having this discussion? Why  
4 is this important in this Chapter 11 case? The arbitration  
5 award may get in one day, and someone may ask me, and I may  
6 say yes, I may say no. It depends on what the legal arguments  
7 are.

8 MS. LAMBERT: It's --

9 THE COURT: Why is this relevant right now?

10 MS. LAMBERT: It's important to the public's  
11 perception, and the U.S. Trustee is charged with making the  
12 information about a case available to the public.

13 MR. MORRIS: Your Honor, there is no motion --

14 MS. LAMBERT: This -- these -- these arbitration --

15 MR. MORRIS: There's no relief that's been sought.

16 MS. LAMBERT: The arbitration awards have been  
17 discussed in the press, Your Honor. And the press --

18 THE COURT: Well, let me just say this. Okay? This  
19 was obviously -- there was an arbitration award. It was never  
20 confirmed with a judgment by a court. And I am presuming -- I  
21 don't need to decide today -- but I'm presuming that there is  
22 some legal argument that someone feels can be made about why  
23 that arbitration award is confidential. You know, it  
24 obviously --

25 MR. MORRIS: The Committee made that argument in

1 their motion.

2 THE COURT: Obviously, if there had been a judgment,  
3 it all would have been out in the world. And I will say I  
4 cannot remember ever being in a situation where someone wanted  
5 to keep an arbitration award confidential in a bankruptcy  
6 case. Maybe it happens. I'm just -- I've never seen it. So  
7 if there is a day where someone wants me to find this  
8 arbitration award can be made public, I may very well do it.  
9 I don't know. I'll hear the legal arguments. But I am just  
10 asking, why are we arguing about this today?

11 MS. LAMBERT: We're arguing about it today because it  
12 remains a point of interest and a point of information sharing  
13 to government creditors and other creditors that are involved  
14 in the case, as well as the public.

15 THE COURT: They're not in here, the SEC or whoever  
16 you're --

17 MS. LAMBERT: Well, how would they know to be in  
18 here?

19 THE COURT: Because maybe they've seen the press that  
20 you're talking about. All right. I don't know --

21 MR. MORRIS: Your Honor, we -- the Debtor's heard  
22 what --

23 THE COURT: The protective order governs. And my  
24 prior order with regard to the sealing motion I think made  
25 clear, but if it didn't, I'm going to say right now: As far

1 as I'm concerned, the arbitration award, nothing gets unsealed  
2 on the Court's docket, and no one will file it or disclose it  
3 without bringing a motion, and we'll have a legal argument and  
4 evidence or whatever we need and I'll rule on the issue.

5 MS. LAMBERT: So, Your Honor, my understanding is  
6 that the Court is striking the objection to the CRO that the  
7 Committee filed and striking the U.S. Trustee's motion to  
8 dismiss, which was redacted, and striking the evidence, and  
9 those will not be on the docket available to the public at  
10 all.

11 THE COURT: That's not what I'm doing. I don't -- I  
12 don't even know -- I don't understand why you're saying that.

13 MS. LAMBERT: Well, you can't just withdraw the  
14 objection. The objection had the exhibits attached to it.  
15 The issue that the U.S. Trustee -- I'm sorry, but I'm always  
16 charged with this issue -- is trying to unseal documents and  
17 trying to determine the proper date for unsealing them. They  
18 attached to the arbitration award, like a motion for summary  
19 judgment. That's the practice in Delaware. And so the issue  
20 is, at what point will that become unsealed? It's a higher  
21 standard --

22 THE COURT: The answer is no, without an order from  
23 this Court.

24 MS. LAMBERT: It is a higher standard than for  
25 confidentiality. And in addition, --

1 THE COURT: All right. If you want to file a motion  
2 and we set it for hearing and we have briefing, we'll do that.  
3 But, for now, there's -- there are two orders that I will tell  
4 you on the record what they mean is, right now, the  
5 arbitration award is not to be publicly disclosed. Not by the  
6 Court on the docket system. Not by any person.

7 If someone wants to publicly disclose it, they can file a  
8 motion and we'll talk about whether it's protected or not.

9 MR. MORRIS: Thank you.

10 THE COURT: Whether there are grounds, legal grounds,  
11 to protect it.

12 MR. MORRIS: Thank you, Your Honor.

13 THE COURT: I've told you I'm skeptical. I'm  
14 skeptical. But, you know, we'll see. Okay?

15 MS. LAMBERT: Okay. Your Honor, the FJC publication  
16 is very clear that the Court should be trying, when issues are  
17 moot, to unseal items. And this is why our advocacy is this  
18 way. And I will move to unseal it.

19 THE COURT: All right.

20 MR. DEMO: For the record, Your Honor, again, Greg  
21 Demo; Pachulski Stang Ziehl & Jones; for the Debtor.

22 Before we move on to the Foley retention, two quick  
23 housekeeping matters.

24 THE COURT: Uh-huh.

25 MR. DEMO: We would like to set the next omnibus

1 hearing date on April 22nd. At that date, we would do the  
2 quarterly fee applications and whatever else comes up onto the  
3 docket.

4 THE COURT: All right. Have you run that by Traci  
5 Ellison yet?

6 MR. DEMO: We have not.

7 THE COURT: Okay.

8 MR. DEMO: We've talked to the Committee about it,  
9 though.

10 THE COURT: So I will call her right now.

11 MR. DEMO: And then, I guess, Your Honor, before you  
12 do that, we are actually asking for a hearing date on March  
13 4th at 1:30 as well. We're going to have an expedited motion  
14 that we'll be filing, I think, this week. So if you're going  
15 to check with her, I guess it might make sense to check on  
16 both of those dates.

17 THE COURT: Okay.

18 (Court confers with Clerk telephonically.)

19 THE COURT: Okay. We can give you April 22nd, as you  
20 requested, at 9:30.

21 MR. DEMO: Okay. Thank you.

22 THE COURT: Okay. So that's going to be an omnibus.

23 (Court confers with Clerk telephonically.)

24 THE COURT: All right. We can give you March 4th at  
25 1:30.

1           How about a preview of what we're going to -- what are we  
2 going to be seeing?

3           MR. DEMO: And, Your Honor, I guess we had also  
4 reserved March 2nd, and we can release that date.

5           THE COURT: What? I'm sorry.

6           MR. DEMO: We had previously reserved March 2nd at  
7 9:30 for the expedited motion, which I'll describe briefly in  
8 a second. We don't need the March 2nd date.

9           THE COURT: So, okay.

10          MR. DEMO: Yeah.

11          THE COURT: All right. So I'll tell Traci that one  
12 --

13          MR. DEMO: Yeah. Okay. Perfect. Thank you.

14          THE COURT: -- is off. Okay. What is this going to  
15 be?

16          MR. DEMO: The expedited motion, we obviously run a  
17 series of investment funds. From time to time, those funds,  
18 either through liquidation or just through normal proceeds  
19 generation, make distributions out to their investors.

20          Under the protocols, distributions out to what are  
21 related, called related entities under the protocols, which  
22 include Mr. Dondero, entities owned by Mr. Dondero, and  
23 numerous other categories, those entities cannot receive their  
24 distributions from those investment vehicles if the Committee  
25 objects to those distributions unless we come to the Court and



1 we get Your Honor's approval.

2 That issue has come up. We are hoping to make those  
3 distributions to these related entities. The Committee has  
4 said that they will object, but they've also agreed to the  
5 motion to expedite.

6 THE COURT: All right.

7 MR. DEMO: So that's the issue that's going to be in  
8 front of Your Honor on March 4th.

9 THE COURT: All right. When are you going to file  
10 the motion?

11 MR. DEMO: We are hoping to file it, I think, by  
12 Friday.

13 THE COURT: Okay. So that would be -- what are we at  
14 now, the 19th?

15 MR. DEMO: Yeah.

16 THE COURT: Okay. So that'd be --

17 MR. DEMO: Yeah. And obviously, --

18 THE COURT: -- a couple weeks.

19 MR. DEMO: -- yeah, we'll endeavor to get it filed as  
20 soon as possible.

21 THE COURT: Okay.

22 MR. DEMO: And then I guess the last item, Your  
23 Honor, is the Foley Gardere retention application.

24 THE COURT: Okay.

25 MR. DEMO: And, you know, this should be a relatively

1 simple retention application. You know, we'll get into it a  
2 little bit more. There are two objections that were  
3 originally filed, one by the Committee and one by Acis.  
4 Yesterday morning, the Committee withdrew their objection, so  
5 the only objection to the Foley Gardere retention application  
6 is by Acis.

7 In the courtroom with me are Holland O'Neil with Foley  
8 Gardere -- she's the partner in charge of that representation  
9 -- and then also The Honorable Russell Nelms, who's a member  
10 of the Independent Board of Directors of Strand Advisors, the  
11 party that manages the Debtor. And I should be remiss if I  
12 didn't mention that the two other independent directors, James  
13 Seery and John Dubel, are also in the courtroom, --

14 THE COURT: Okay.

15 MR. DEMO: -- as is the Debtor's chief restructuring  
16 officer.

17 And as I said, Your Honor, really, the only thing, the  
18 only substantive thing we're here this morning on is this  
19 retention application. The retention application is under  
20 Section 327 of the Bankruptcy Code, and it's to represent the  
21 Debtor in three matters related to the Acis bankruptcy and the  
22 resulting litigation.

23 Judge Nelms is going to be testifying in support of the  
24 Foley retention this afternoon.

25 THE COURT: Okay.

1 MR. DEMO: We filed the retention application on  
2 October 29th, along with the retention application of Lynn  
3 Pinker. As I mentioned earlier, the Lynn Pinker retention  
4 application was withdrawn. Two objections were filed to the  
5 Foley retention: One by the Committee, one by Acis.

6 The Committee -- or, sorry, the Debtor addressed those two  
7 objections in an omnibus reply that we filed on November 21st.  
8 The primary response to those objections was providing  
9 additional disclosure to this Court concerning the parties  
10 being represented by Foley, the proceedings in which Foley was  
11 going to represent those parties, and the allocation of fees,  
12 of Foley's fees, across those parties.

13 The reply disclosed, and Judge Nelms will also testify,  
14 that the Debtor had originally intended to engage Foley on  
15 four matters, not three. The first matters is general matters  
16 just relating to the Acis bankruptcy, status conferences,  
17 proof of claim issues. The second matter is the appeal to the  
18 Fifth Circuit of the confirmation order. The third matter was  
19 the appeal, again to the Fifth Circuit, of the entry of the  
20 involuntary petition. And then the fourth matter was the  
21 appeal of Winstead's retention as counsel to both Mr. Terry,  
22 who is a pre-petition creditor of Acis, and Robert [sic]  
23 Phelan as the Chapter 11 trustee.

24 The two appeals, the appeal of the confirmation order and  
25 the appeal of the involuntary petition, have been fully

1 briefed to the Fifth Circuit, and some of that briefing was  
2 done, by necessity, post-petition, because of the drag in time  
3 between when we filed the retention and now. And the Fifth  
4 Circuit has actually set both of those appeals for oral  
5 argument. They've been consolidated for purposes of oral  
6 argument, and both of the appeals are set for March 30th, so  
7 about six weeks away.

8 Now, it's an understatement to say a lot has happened in  
9 this case since we filed the reply on November 21st. One of  
10 the most major things in this case, as the Court knows, is the  
11 appointment of the Board of Directors. The Board of Directors  
12 was appointed on January 9th and it oversees the management of  
13 the Debtor. Judge Nelms is in this courtroom and will be  
14 testifying as to what the Board did to familiarize itself with  
15 the Acis litigation and with Foley's retention. And you'll  
16 hear from Judge Nelms that the Board had extensive  
17 conversation with the Debtor's employees, including the  
18 Debtor's internal legal team, Ms. O'Neil with Foley Gardere,  
19 attorneys from Pachulski regarding the status of the Acis  
20 litigation and the bankruptcy and Foley's retention.

21 You'll also hear that Judge Nelms reached out directly to  
22 Josh Terry, the major party in the Acis litigation, and that  
23 Judge Nelms met with both Josh Terry and Ms. Patel to discuss  
24 the status of the Acis litigation.

25 And then finally you'll hear, as part of that diligence,

1 that the Board analyzed the economic benefit of proceeding  
2 with Foley's retention in all three of those matters that I  
3 mentioned and also conducted their own diligence on the claims  
4 that are being raised in those matters.

5 As a result of that diligence, and I'll discuss the  
6 explicit reasons later, the Board determined that it is in the  
7 best interest of the Debtor and its estate to proceed with  
8 Foley's retention with respect to the three matters I  
9 mentioned earlier: the Acis general bankruptcy, the appeal of  
10 the confirmation order, and the appeal of the involuntary  
11 petition.

12 The Debtor has also asked for Foley's assistance on  
13 certain ancillary matters, like including about disclosures of  
14 the Acis litigation, including what needs to go on the  
15 schedules and things like that.

16 As a result of this diligence, however, the Board decided  
17 to drop the Winstead appeal. So Acis -- I'm sorry, Foley is  
18 not going to be retained to challenge Winstead's retention in  
19 that proceeding. And assuming that Foley is retained, Foley  
20 will prepare the papers to withdraw that objection as soon as  
21 possible.

22 As a quick aside, though, you know, Foley was directed by  
23 the Debtor to continue with the Winstead matter post-petition.  
24 Incurred about \$25,000 of fees. And we believe that Foley was  
25 working in good faith on that. So although we're not going to

1 proceed with the Winstead matter, we would still ask that  
2 Foley be entitled to file a fee application for those fees.  
3 The Committee has agreed with this, and we have a form of  
4 proposed order with the Committee that contemplates Foley's  
5 payment or Foley's receiving payment for the Winstead fees of  
6 \$25,000.

7 THE COURT: Wait. You're talking about, if I approve  
8 their retention, rolling that into the retention order?

9 MR. DEMO: We are, Your Honor.

10 THE COURT: Okay.

11 MR. DEMO: No?

12 THE COURT: That's a no-go, I'll tell you right now.

13 MR. DEMO: Okay.

14 THE COURT: I mean, --

15 MR. DEMO: And we can, we can deal with that.

16 THE COURT: Yeah.

17 MR. DEMO: But I --

18 THE COURT: I'm not going to say yes or no to any  
19 fees I haven't seen.

20 MR. DEMO: Okay. And -- well, I'm sorry. What's  
21 going to be rolled into the order is their ability to file for  
22 those fees. Everybody would still have the right to object to  
23 those fees. You would have the right to say yes or no on  
24 those fees. The only thing that we would be asking for is  
25 that they would be able to apply for those fees and that the

1 fact that they weren't retained on that matter specifically  
2 would not be a basis for an objection to those fees. So it's  
3 a little bit different.

4 THE COURT: Okay.

5 MR. DEMO: We're not trying to cut off anybody's  
6 right to object to those fees.

7 THE COURT: Okay. But I don't want to put some  
8 imprimatur on their ability to ask for them.

9 MR. DEMO: Okay.

10 THE COURT: Okay? So, you know, it's just another  
11 day.

12 MR. DEMO: Yeah.

13 THE COURT: If they ask for that in a fee app -- if I  
14 approve their retention and they ask for it in a fee app,  
15 we'll --

16 MR. DEMO: Okay. Understood, Your Honor.

17 THE COURT: -- decide whether it's meritorious or  
18 not.

19 MR. DEMO: Okay.

20 THE COURT: Okay.

21 MR. DEMO: And then I guess, just moving on, you  
22 know, as you'll hear from Judge Nelms, all of the elements of  
23 227(e), you know, have been met. You know, first, Foley is  
24 being retained for a special purpose. Nobody has objected on  
25 that basis.

1 Second, Foley is not being retained to conduct the  
2 Debtor's bankruptcy case. That's my firm, Pachulski Stang.  
3 Again, nobody has objected on that basis.

4 Third, Foley represented the Debtor prior to the petition  
5 date on these matters. Again, nobody has objected on that  
6 basis.

7 And, fourth, you know, as Judge Nelms will testify, the  
8 retention of Foley and Foley's continued prosecution of the  
9 Acis matters is in the best interest of the Debtor's estate.

10 And then fifth and finally, Foley has no adverse interest  
11 with respect to the matters on which it is being retained.

12 Now, as I mentioned, there were two omnibus objections  
13 that were filed. There was the Committee's objection and then  
14 there was Acis's objection. Both of these objections really  
15 had one common theme, which was that there was insufficient  
16 disclosure as to how the fees were going to be allocated, and,  
17 honestly, whether or not Mr. James Dondero would benefit from  
18 Foley's retention without paying his share of those fees.

19 Now, we had a meeting with the Committee on Friday and we  
20 walked through this issue. And as a result of that, the  
21 Committee withdrew its objection.

22 What we told to the Committee is that, prior to the Acis  
23 bankruptcy -- and this goes primarily to the retention -- or,  
24 the prosecution of the involuntary petition appeal. In that  
25 appeal, Foley is representing just Neutra. Foley is not



1 representing the Debtor. Now, the economic benefit to the  
2 estate, though, in that appeal accrues almost solely to the  
3 Debtor. It does not accrue to Neutra or to Neutra's economic  
4 interest owners, which, full disclosure, are Mr. James Dondero  
5 and Mr. Mark Okada.

6 The reason why the Debtor -- and you'll hear, again, hear  
7 this from Judge Nelms -- believes that it's in the economic  
8 best interest of its estate to pay for Neutra's fees in that  
9 appeal is that, if Neutra is successful in that appeal, the  
10 involuntary petition obviously will be struck, the involuntary  
11 will be unwound, and the economic interest and the economic  
12 ownership of Acis will revert to Neutra.

13 Upon that reversion, Highland Capital Management will be  
14 reinstated as the advisor to Neutra.

15 Now, if Neutra -- I'm sorry, if Acis then generates fees,  
16 those fees are going to be paid about 85 percent to satisfy  
17 the contractual obligations under that advisory agreement.

18 So, on a go-forward basis, again, if Neutra is successful,  
19 85 percent of the revenue generated by Acis will go to Neutra.  
20 That remaining 15 percent will be used to satisfy the claim  
21 that Acis -- I'm sorry, that Highland Capital Management has  
22 against Acis for the pre-, post-petition, and gap period  
23 services that it provided to Acis under the advisory  
24 agreements. That claim is about \$8 million.

25 So, 85 percent of the revenue on a go-forward basis is

1 going to be used to satisfy the obligations under the  
2 management agreement. The balance of that is going to be used  
3 to satisfy that \$8 million claim.

4 That means that, you know, if our math is right -- and  
5 obviously, the numbers are not static -- that there's not  
6 going to be any contributions or any distributions to the  
7 upstream equity, to Mr. Dondero or Mr. Okada, for about four  
8 years. After that four years, 85 percent of the revenue is  
9 still going to go to Highland Capital Management, the Debtor,  
10 under those advisory agreements.

11 So for that reason, we do believe, and Judge Nelms will  
12 testify, that the true economic beneficiary of the Neutra  
13 appeal of the involuntary petition is actually Highland  
14 Capital Management.

15 THE COURT: I don't want to jump ahead too much, but  
16 are we going to talk today about mootness as a potential issue  
17 with both of these appeals? I mean, you know, I have to say  
18 it's very compelling to me that you tell me all the briefing  
19 has been done --

20 MR. DEMO: Uh-huh.

21 THE COURT: -- and oral argument is set in March, so  
22 -- but is mootness a --

23 MR. DEMO: We don't --

24 THE COURT: Was there ever a motion to dismiss for  
25 mootness or --

1 MR. DEMO: Not that I'm aware of, Your Honor.

2 THE COURT: Okay.

3 MR. DEMO: And all the briefing has been done.

4 THE COURT: Okay.

5 MR. DEMO: Again, oral argument is set. And as far  
6 as I know, nobody has raised that issue.

7 THE COURT: Okay.

8 MR. DEMO: So I think that we're still proceeding as  
9 to whether --

10 THE COURT: And, again, I'm leaping ahead, but I'm  
11 just -- you know, you went through the scenario --

12 MR. DEMO: Uh-huh.

13 THE COURT: -- to show that, you know, Dondero and --  
14 if the involuntary was reversed, you know, no money would ever  
15 get there. But you're painting a picture, to me, that, again,  
16 it feels a little farfetched. But the evidence will either,  
17 you know, bear it out or not.

18 MR. DEMO: Again, the evidence, you know, I think,  
19 will bear it out.

20 And I think what's important also is, when you're thinking  
21 about this, is to think of the actual universe of post-  
22 petition fees that Foley is going to incur for those services,  
23 for the briefing of the two appeals and then for the  
24 bankruptcy services, versus the actual economic gain that the  
25 Debtor could and hopefully will get if those appeals are

1 successful.

2 THE COURT: Okay.

3 MR. DEMO: So, Foley --

4 THE COURT: And hopefully the evidence will really go  
5 to this.

6 MR. DEMO: Yes.

7 THE COURT: I'm trying to think of -- I'm trying to  
8 decide what life looks like --

9 MR. DEMO: Right.

10 THE COURT: -- if there is a successful reversal.

11 MR. DEMO: Right.

12 THE COURT: And I'm not at all clear. So the  
13 evidence and argument will hopefully make me clear.

14 MR. DEMO: Yes. And, honestly, Your Honor knows the  
15 facts and circumstances --

16 THE COURT: Right.

17 MR. DEMO: -- better than me and probably better than  
18 anyone.

19 THE COURT: Uh-huh.

20 MR. DEMO: But I think what's --

21 THE COURT: I mean, we've had -- we had terminated  
22 contracts --

23 MR. DEMO: Right.

24 THE COURT: -- with Highland. We have a Reorganized  
25 Debtor now, which, you know, --

1 MR. DEMO: Right.

2 THE COURT: -- has new contractual arrangements.

3 MR. DEMO: Right.

4 THE COURT: I just, I'm not sure how that all goes  
5 away if there's a reversal. So I'm --

6 MR. DEMO: Right.

7 THE COURT: I'm really wanting to drill down on the  
8 benefit --

9 MR. DEMO: Okay. And --

10 THE COURT: -- to Highland.

11 MR. DEMO: And we can do that. But I think --

12 THE COURT: Okay.

13 MR. DEMO: -- it's helpful to talk about --

14 THE COURT: Uh-huh.

15 MR. DEMO: -- the universe of fees first and then  
16 talk about the related benefit for that.

17 Foley Gardere has helpfully filed two post-petition fee  
18 applications. Those fee applications disclose that, on all  
19 three of these matters, Foley has billed about \$330,000. We  
20 believe that Foley was probably going to bill, up through the  
21 end of oral argument, about \$500,000.

22 And then, you know, again -- and not getting too deep into  
23 it, because I do think this is something that's better for  
24 testimony because I think it goes to, you know, what the Board  
25 believes is the economic benefit to the estate -- but if the

1 Neutra appeal is successful, if the confirmation order appeal  
2 is successful, then the post-petition fees that are going to  
3 accrue or we believe are going to accrue to Highland Capital  
4 Management under those contracts are tens of millions of  
5 dollars a year.

6 The post-petition and gap period and pre-petition fees  
7 that we believe that Acis owes to Highland are \$8 million a  
8 year. And then there's the go-forward fees.

9 So we believe that, for spending \$500,000, the benefits to  
10 the estate are actually going to be in the tens of millions of  
11 dollars. So, you know, even though, you know, reasonable  
12 minds can differ as to the merits -- and, again, we'll put on  
13 some testimony about that, although there's obviously  
14 privilege issues and things like that -- the actual economic  
15 benefit to the estate is \$500,000 versus the possible benefit  
16 of \$50 million, possibly more dollars, plus the removal of a  
17 substantial portion of Acis's proof of claim, which is -- I  
18 think it says not less than \$75 million. So you're looking  
19 at, if we're successful, fees into the estate --

20 THE COURT: Well, that's a different issue, though.  
21 Isn't that --

22 MR. DEMO: It is, but it --

23 THE COURT: Isn't that the Acis adversary proceeding  
24 component?

25 MR. DEMO: Yes.

1 THE COURT: So, --

2 MR. DEMO: But if the -- if the -- and, again, I  
3 don't want to get too far into this --

4 THE COURT: Uh-huh.

5 MR. DEMO: -- because I don't want to get into, you  
6 know, legal arguments that are going to be on appeal.

7 THE COURT: Uh-huh.

8 MR. DEMO: But what we believe is that, and what  
9 Judge Nelms will testify to and what you'll hear, is that if  
10 the confirmation order and the involuntary petition are  
11 erased, especially the involuntary petition, and we go back to  
12 status quo ante, the benefit to the estate is going to be in  
13 the tens of millions of dollars, at a minimum, plus the  
14 possible diminution, to a large extent, of a proof of claim  
15 that is not less than \$75 million, and we've heard numbers of  
16 up to \$300 million.

17 So you're looking to spend \$500,000 on these two matters  
18 for a benefit to the estate that's going to be astronomically  
19 more than that. So the benefit to the estate versus the money  
20 that is going out of the estate, especially since everything  
21 has been briefed and set for oral argument, I guess,  
22 personally, I find it difficult to not see that benefit and  
23 not to see that spending that half a million dollars to  
24 possibly get back \$50-plus million, I just don't see how  
25 that's not a benefit to the estate and how that does not

1 warrant the retention of Foley Gardere in the limited matters  
2 that we're honestly asking them to be retained for.

3 THE COURT: All right.

4 MR. DEMO: Okay.

5 THE COURT: I'll hear other opening statements on  
6 this.

7 MR. LAMBERSON: Good morning, Your Honor. Phillip  
8 Lamberson on behalf of Acis Capital Management.

9 First of all, let me start off with outlining exactly what  
10 our limited objection relates to. We are not objecting to the  
11 Debtor retaining Foley Gardere to handle the litigation  
12 matters for the Debtor. So, for example, the Acis litigation,  
13 anything related to the Acis bankruptcy, that's fine. We  
14 don't have any objection to that.

15 THE COURT: So the mega-adversary proceeding against  
16 Highland and affiliates that is stayed, --

17 MR. LAMBERSON: Uh-huh.

18 THE COURT: -- I have a giant Report and  
19 Recommendation on my desk that was ready to go about the time  
20 the Highland bankruptcy was filed -- but it's stayed: You  
21 would have no objection to Gardere defending Highland --

22 MR. LAMBERSON: Correct.

23 THE COURT: -- in that if ever a motion to lift stay  
24 is filed and that goes forward?

25 MR. LAMBERSON: Correct.



1 THE COURT: Okay.

2 MR. LAMBERSON: And, for example, I believe counsel  
3 mentioned this: To the extent that there's a status  
4 conference in the Acis case or something like that, we don't  
5 have any issue with Foley representing the Debtor as it  
6 relates to that.

7 We don't have any objection to the representation of the  
8 Debtor as it relates to the Debtor's appeal of the  
9 confirmation order. We don't have any objection to Neutra's  
10 retention of Foley at all. In fact, we don't have any basis  
11 to object to Neutra's retention of Foley Gardere. Neutra is  
12 not a debtor.

13 We fully expect and anticipate that we'll be opposite  
14 Foley Gardere in the appeal which is going to be argued at the  
15 end of next month, as well as any matters in front of this  
16 Court.

17 What we do object to is the Debtor agreeing -- frankly,  
18 pre-agreeing -- to pay Foley Gardere for litigation costs  
19 incurred by non-debtors, and, specifically, Neutra. And as  
20 counsel outlined, and the reply filed by the Debtors is very  
21 clear on this point, Neutra is not a subsidiary of the Debtor.  
22 Neutra is ultimately owned one hundred percent by Mr. Dondero  
23 and Mr. Okada.

24 So why, why are we objecting? There's a couple of  
25 reasons. Number one, this is obviously an extremely unusual

1 request. It's not really a --

2 THE COURT: Okay. Let me just make sure I heard you  
3 correct. The only thing that Acis is objecting to is the  
4 Debtor paying fees for Gardere -- Foley Gardere's  
5 representation of Neutra?

6 MR. LAMBERSON: Correct.

7 THE COURT: Okay. So, --

8 MR. LAMBERSON: Right. And let me --

9 THE COURT: -- you don't have a problem with Foley  
10 representing the Debtor in these appeal -- well, the Debtor  
11 isn't an appellant in the involuntary appeal, right? Or no?

12 MR. LAMBERSON: It is -- no. So, the Debtor is an  
13 appellant in the --

14 THE COURT: The confirmation order.

15 MR. LAMBERSON: -- confirmation order appeal.

16 THE COURT: Uh-huh.

17 MR. LAMBERSON: It's one of two appellants.

18 THE COURT: Uh-huh.

19 MR. LAMBERSON: The other one is Neutra.

20 THE COURT: Uh-huh.

21 MR. LAMBERSON: Neutra is the only appellant in the  
22 confirmation order -- I'm sorry, in the order for relief  
23 appeal.

24 THE COURT: Okay. So you don't have any problem with  
25 Foley's retention; it's just you don't want the Debtor to pay

1 Neutra's legal fees?

2 MR. LAMBERSON: Correct.

3 THE COURT: And there needs to be some allocation in  
4 the confirmation appeal between Neutra and the Debtor, and it  
5 needs to all be paid by Neutra, --

6 MR. LAMBERSON: Correct.

7 THE COURT: -- not the Debtor? Okay.

8 MR. LAMBERSON: Yeah. That's exactly correct, Your  
9 Honor.

10 THE COURT: Okay. Just --

11 MR. LAMBERSON: So I wanted to be clear on that, --

12 THE COURT: Okay.

13 MR. LAMBERSON: -- that we're not -- we understand  
14 that they're --

15 THE COURT: Okay.

16 MR. LAMBERSON: -- going to be our opponents going  
17 forward, and we're fine with that.

18 THE COURT: Uh-huh.

19 MR. LAMBERSON: I actually like Mrs. O'Neil.

20 So, why are we objecting? So, there's a couple of  
21 reasons. One is procedural and one is really more  
22 substantive. So, this is obviously a strange request under  
23 Section 327. 327 is to approve counsel for the Debtor, for  
24 the estate. And this request doesn't really fit.

25 So, for example, you engage Foley Gardere. You agree that

1 the Debtor is going to pay fees under 330. Okay. Well, how  
2 do we apply 330 in this situation, right? What constitutes  
3 reasonable and necessary as it relates to the Debtor when the  
4 work wasn't done for the Debtor? What constitutes a  
5 determination of whether it was beneficial to the Debtor when,  
6 again, the work wasn't done for the Debtor?

7 There's other issues, obviously. Who controls Neutra?  
8 It's not controlled by the Debtor. The Debtor doesn't own any  
9 of Neutra. Who is making litigation decisions for Neutra?  
10 All we know is that the Debtor is paying the freight for  
11 whatever Neutra decides to do going forward.

12 The other issue, Your Honor, and this is probably the  
13 broader issue, is this decision evidences a continuation of a  
14 failed litigation strategy that precipitated this bankruptcy  
15 in the first place. Right? So, we all heard that the reason  
16 Highland Capital Management had to file bankruptcy is because  
17 they couldn't pay the Crusader judgment. Right? They had a  
18 \$190 million judgment, or about to be judgment against them,  
19 and they couldn't pay it.

20 So let's look at the Committee. Right? We have a  
21 Committee with four members on it. Three of them are  
22 litigants. Three of them are in active litigation against the  
23 Debtor.

24 If you look at the Top 20 List in this case, of the Top  
25 10, only one of them is not a litigation creditor, and that's

1 -- I'm trying to -- is an insider creditor. The rest of the  
2 Top 10 are either litigation adversaries or they're law firms  
3 that were paid to fight the litigation adversaries.

4 So why is the Debtor continuing its strategy of fighting  
5 every last issue, and using various instrumentalities to do  
6 it, and then paying the freight for all of it? That's exactly  
7 how we got to where we are today in this case.

8 So, let me address also the benefit from the Neutra  
9 appeal. And, Your Honor, I think that's definitely an area  
10 that we need to probe. Because, like you, I don't get it. I  
11 think what they're outlining is sort of a fantasyland where  
12 money is going to rain from the sky when they win this appeal,  
13 or if they win this appeal. And obviously, their reply goes  
14 on for pages about the benefit to the Debtor.

15 So, just using basic odds of winning -- and I'm not going  
16 to go to the substance of this appeal, which I think is  
17 probably worse than the basic odds -- there's a 90 percent  
18 chance that the Fifth Circuit just affirms the -- Judge  
19 Fitzwater's ruling. Right? I mean, there's a 90 percent  
20 chance that what the Debtor gets out of this is an affirmation  
21 that says, "You lose." Right?

22 But even if it's reversed, --

23 THE COURT: What are you basing that on? Because  
24 Fitzwater affirmed 90 percent of the time?

25 MR. LAMBERSON: Well, so, actually, Judge -- and Ms.

1 Chiarello can probably address this more specifically -- Judge  
2 Fitzwater actually gets affirmed, I think, more than 90  
3 percent of the time, --

4 THE COURT: Probably, yes.

5 MR. LAMBERSON: -- but the general reversal rate at  
6 the Fifth Circuit is about ten percent. So, and that  
7 obviously includes things like 1983 appeals and things like  
8 that.

9 But even if it is reversed, which I think we'd all agree  
10 is fairly unlikely, again, money isn't just going to start  
11 raining down on Highland Capital. So what's most likely going  
12 to happen if the Fifth Circuit decides to reverse -- and let  
13 me, let me point out one issue, Your Honor. The only issue on  
14 appeal, I should say the only -- there are various issues on  
15 appeal, and I'll just click through them. So, one of them is  
16 whether Neutra has standing to appeal. Right? Whether they  
17 qualify under the person aggrieved standard that the Fifth  
18 Circuit uses. That's obviously a gating issue. And, by the  
19 way, that's the basis of Judge Fitzwater's ruling affirming  
20 this Court's ruling, which was basically Neutra doesn't have  
21 standing to appeal the order for relief. They're not the  
22 Debtor.

23 So the first issue is whether Neutra is a person  
24 aggrieved. Okay?

25 The second issue, and this is the substantive bankruptcy

1 issue, the only substantive bankruptcy issue, is whether the  
2 order for relief should have been arbitrated. Right? So  
3 that's the next issue. That would be, frankly, the issue that  
4 the Fifth Circuit would have to reverse on, is that well, yes,  
5 this should have been arbitrated. Right? The order for  
6 relief should have been arbitrated.

7 And then the final issue that we raised on appeal is  
8 whether, even if Neutra has standing and even if there was  
9 some right to arbitration, whether Neutra, via the putative  
10 debtor, waived its right to arbitration by waiting until  
11 literally, and you'll remember this, literally the day before  
12 the order for relief file started, to raise its request for  
13 arbitration. Right?

14 So, assuming that they get some reversal, what's really  
15 likely to happen is that the Court, the Fifth Circuit is going  
16 to send it back to you on a remand and say, This is the  
17 standard you should have applied, you need to make this  
18 finding, or something like that, right? It's very unlikely  
19 the Fifth Circuit is going to say, We're going to reverse and  
20 we're just going to render, right, and this thing just goes  
21 away forever, particularly considering that the only live  
22 substantive issue is whether the order for relief should have  
23 been arbitrated, right?

24 But even if Neutra wins and its relief is wholly granted,  
25 well, what does that mean? That doesn't mean that the

1 involuntary goes away. It doesn't mean the order for relief  
2 permanently goes away. It means that we go arbitrate it.  
3 Right? That's what they asked for, is that we go arbitrate  
4 it. So now we go arbitrate it. Right?

5 So, basically, if you break it down, if, in the unlikely  
6 event Neutra wins on appeal, it doesn't mean the bankruptcy  
7 permanently goes away. What it means is we have more  
8 litigation. Right? And that's what normally happens when  
9 there's a reversal on appeal, right? You relitigate the  
10 issues that were litigated in the first place.

11 So this concept -- you're exactly right, Your Honor. This  
12 sounds like fantasyland. This concept that money is just  
13 going to fall out of the sky and onto Highland because Neutra  
14 got a reversal is just not going to happen.

15 There's some other problems here, obviously. Counsel just  
16 spent a lot of time talking about how all of Acis's funds are  
17 going to get paid to Highland. Well, that completely misses  
18 the point that Josh Terry has an eight, probably somewhere in  
19 the neighborhood of maybe \$12 million judgment now against  
20 Acis. They're just going to ignore that? They're just going  
21 to ignore the fact that their largest creditor has a judgment  
22 against them and is just hanging out there? That's going to  
23 have some impact on what happens to all that cash flow.

24 And then, finally -- and we'll talk about this in more  
25 substance when we get to the testimony -- as you recall, this



1 was the entire basis of the Acis case: Mr. Dondero and  
2 Highland Capital were aggressively trying to liquidate Acis  
3 when we showed up in your Court asking for relief. So what  
4 makes anybody think that that isn't going to continue  
5 happening if there's not a bankruptcy anymore? Right?

6 And Your Honor will recall that you had to twice enjoin  
7 Dondero affiliates, HCLOF, from liquidating the PMAs and  
8 Acis's assets during the bankruptcy. Right? So the concept  
9 that if they win on appeal and there is no bankruptcy,  
10 everything just goes away and we're not in this Court at all,  
11 that Acis is going to have all of these valuable PMAs and cash  
12 flow and it's all going to go to the benefit of Highland, is  
13 completely contrary to what happened during the Acis case and  
14 what precipitated the Acis case.

15 One other issue that we raised in the objection and in the  
16 Debtor's omnibus reply is what we call the DAF litigation,  
17 which is litigation filed in the Southern District of New  
18 York. And Your Honor, I think you probably remember that from  
19 the pleadings. I do want to point out that -- so this, this  
20 is a serious issue for Acis. And the reason is because,  
21 contrary to what was stated in the reply -- admittedly, this  
22 happened after the reply -- but contrary to what happened --  
23 was stated in the reply, that litigation has now been expanded  
24 to include Acis and Mr. Terry and Brigade, and with basically  
25 the same allegations of CLO mismanagement that were raised in

1 this Court during the confirmation hearing.

2 So this is a very significant matter to us. We are very  
3 concerned that this Debtor is involved in that and is  
4 promoting it in some way. And we want Your Honor to be aware  
5 of that litigation and the actions that are taken challenging  
6 your rulings in a court that's miles and miles away from here.

7 Thank you, Your Honor.

8 THE COURT: All right. Mr. Morris, are you ready to  
9 call your witness?

10 MR. MORRIS: Yes, I am, Your Honor. The Debtor calls  
11 Russell Nelms.

12 THE COURT: All right.

13 MR. MORRIS: Your Honor, I have some exhibit binders.  
14 May I hand up?

15 THE COURT: You may. All right. Well, odd as it is,  
16 I suppose I in this context need to swear you in.

17 RUSSELL NELMS, DEBTOR'S WITNESS, SWORN

18 THE COURT: All right. Please be seated.

19 MR. MORRIS: John Morris for Pachulski Stang Ziehl &  
20 Jones on behalf of the Debtor, Your Honor.

21 Before we get to the testimony, the Debtor has put on its  
22 exhibit list nine specific documents that are in the binder  
23 before you, and the Debtor moves for the introduction of those  
24 documents into evidence.

25 THE COURT: All right. Any objection?

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1 MR. LAMBERSON: No objections, Your Honor.

2 THE COURT: Exhibits 1 through 9 are admitted.

3 (Debtor's Exhibits 1 through 9 are received into

4 evidence.)

5 MR. MORRIS: Thank you, Your Honor.

6 DIRECT EXAMINATION

7 BY MR. MORRIS:

8 Q Mr. Nelms, do you currently have a relationship to the  
9 Debtor?

10 A I do.

11 Q And what is that relationship?

12 A I am one of three independent directors of the Debtor.

13 Q And when were you appointed?

14 A January the 9th of this year.

15 Q Did you just listen to the opening statement on behalf of  
16 Acis?

17 A I did.

18 Q And did you hear the reference to the DAF litigation?

19 A I did.

20 Q And did you hear the allegation that the Debtor somehow  
21 was involved in the prosecution of the DAF litigation?

22 A I heard that, yes.

23 Q Okay. Did there come a time last week that the Board  
24 learned of the possibility of a filing with respect to the DAF  
25 litigation?

Nelms - Direct

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1 A We learned about the filing of the DAF litigation sometime  
2 within the last two weeks.

3 Q And what did the Board do in response to learning that  
4 information?

5 A Well, first of all, I -- we met with Ms. Patel and her  
6 client, Josh Terry. They expressed their concerns about the  
7 DAF litigation. And so the Board used its influence to  
8 encourage the trustee of the DAF, Grant Scott, to dismiss that  
9 litigation, and we have gotten Mr. Scott's commitment to  
10 dismiss the litigation.

11 There's a little bit of an issue there concerning about  
12 whether some of the claims can -- they may need to be  
13 dismissed without -- the preference is, of course, to dismiss  
14 them without prejudice, but there are some issues about that.  
15 But I'm told by Mr. Scott that he's going to dismiss the  
16 litigation.

17 Q Let's go back in time before this was filed. Did the  
18 Board express its view as to whether there should be a filing  
19 at all?

20 A It was really a very brief thing. This was probably a  
21 couple weeks or so ago, kind of late in the day at the end of  
22 a long, long day, one of those long days we've been having.  
23 Someone brought into a board meeting I guess a copy of this  
24 new DAF complaint. It had not been filed at that time. They  
25 showed it to Mr. Dubel. He looked at it and just kind of

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1 asked what it was. There was a brief explanation of what it  
2 was. And Mr. Dubel said, Tell them not to file this. He  
3 goes, This is only going to cause us problems. And that's the  
4 last we heard of it before it was filed.

5 Q And what law firm filed that complaint?

6 A That was filed by the Lynn Pinker firm.

7 Q And after the Board learned that Lynn Pinker filed this,  
8 in spite of the Board's instructions, did the Board take any  
9 steps with respect to Lynn Pinker?

10 A Well, of course, we -- one of the matters that previously  
11 was before the Court was the Lynn Pinker application to be  
12 retained in this case. And I'll just say that it was -- it  
13 was a factor that went into our deliberations concerning our  
14 decision not to go forward with the Lynn Pinker litigation.

15 Q So, I just want to make sure I have this right. So the  
16 Board, upon learning of a possible filing, gave instructions  
17 not to do so; is that right?

18 A It did.

19 Q And upon learning that it was filed, it became one of the  
20 factors that the Board relied upon in determining not to  
21 pursue the Lynn Pinker retention; is that right?

22 A That's correct.

23 Q And you personally reached out to Mr. Terry and Ms. Patel  
24 to discuss the issue; is that right?

25 A Mr. Seery and I did, the two of us.

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1 Q And you used whatever influence you had to try to reach an  
2 agreement for the withdrawal of that complaint without  
3 prejudice; is that right?

4 A That's correct.

5 Q Okay. Now, let's get back to the issues that are relevant  
6 to the actual motion. Are you aware that the Debtor has  
7 sought the Court's approval to retain Foley Gardere as special  
8 counsel?

9 A I am.

10 Q And have you reviewed the court filings with respect to  
11 that motion?

12 A Yes, I have.

13 Q Okay. Can you describe for the Court generally the  
14 matters for which the Debtor seeks to retain Foley Gardere?

15 A There are three matters, essentially. One is an appeal in  
16 the Fifth Circuit which concerns the entry of the order for  
17 relief in the involuntary petition itself. The second is an  
18 appeal in the Fifth Circuit that concerns the confirmation of  
19 the Acis plan. And the third matter is the assertion of,  
20 prosecution of a proof of claim that Highland Capital  
21 Management would have in the Acis bankruptcy.

22 Q Okay. And are these the special purposes for which the  
23 Debtor seeks to retain Foley?

24 A Yes.

25 Q Do you know whether there are matters that were part of

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1 the original motion but which the Debtor no longer seeks to  
2 pursue?

3 A One of the matters that was pending when we took office  
4 was an appeal, and I believe it was still in the District  
5 Court, and that related to an alleged conflict of interest by  
6 the Winstead firm. And so there was an objection to their  
7 fees and an appeal concerning payment of Winstead fees. And  
8 the Board has decided not to go forward with that appeal.

9 Q Okay. So the Board -- did you hear the opening from  
10 Acis's counsel that charged that the Debtor was just doing  
11 more scorched-earth litigation tactics? Did you hear that  
12 charge?

13 A I heard that, yes.

14 Q Okay. But yet the Board has instructed Foley not to  
15 pursue the Winstead matter; is that right?

16 A That's correct.

17 Q And just again, for the record, why did the Board make  
18 that decision?

19 A The Board made that decision because we just thought it  
20 was in the best interest of the Debtor and this estate not to  
21 do that.

22 Q And did the Debtor see any benefit to pursuing that  
23 particular litigation?

24 A You know, there -- a benefit could be articulated, but we  
25 decided not to pursue it.

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1 Q Okay. So, that, plus the Neutra appeal, are two -- I  
2 mean, I apologize, withdrawn. That, plus the DAF matter, are  
3 two examples where the Board exercised its judgment not to  
4 pursue pending litigation; is that fair?

5 A That's correct.

6 Q Okay. Is the Board supportive of the Debtor's application  
7 to retain Foley for the three matters you have described?

8 A It is.

9 Q And without revealing privileged communications, can you  
10 describe generally the diligence that the Board conducted to  
11 reach that decision?

12 A Well, we met with some of the people that work at  
13 Highland. We met with the Debtor's attorneys, the Pachulski  
14 firm. We did have a couple of meetings with Ms. Patel and Mr.  
15 Terry. Some of us have reviewed the pleadings, some more than  
16 others. And, well, we may have done other things, but those  
17 are the ones that come to mind right now.

18 Q I don't know if you mentioned it, but did you confer with  
19 Ms. O'Neil?

20 A Oh, yes, we did. We talked with Ms. O'Neil about it.

21 Q Okay. And what was the purpose of the diligence that you  
22 just described for the Court?

23 A Well, ultimately, what we as a board were trying to do was  
24 to conduct kind of a cost-benefit analysis to the estate: How  
25 much will this potentially cost us? What's the potential



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1 upside of pursuing it? And based upon that cost-benefit  
2 analysis, we thought that this was the best thing to do.

3 Q Okay. Let's just focus on a couple of very narrow 327(e)  
4 issues. Is the Debtor seeking to retain Foley to act as  
5 general bankruptcy counsel?

6 A No.

7 Q And which firm serves as general bankruptcy counsel?

8 A That would be the Pachulski firm.

9 Q Okay. And do you know whether Foley Gardere represented  
10 the Debtor's interest in each of the three matters that you've  
11 described?

12 A It has been representing the Debtor previously.

13 Q Okay. So let's talk about those three matters. The first  
14 one I believe you said was with respect to the representation  
15 of the Debtor in connection with an \$8 million claim that it  
16 has against Acis; is that right?

17 A That's correct.

18 Q And is that the claim -- is that the subject of a formal  
19 proof of claim?

20 A Yes.

21 Q Okay.

22 A It is a claim filed in the Acis case.

23 Q I've placed before you an exhibit binder, and I would ask  
24 you to turn first to Exhibit 4.

25 A Okay.

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1 Q And is that one of the proofs of claim that the Debtor has  
2 filed against Acis?

3 A It is.

4 Q And you'll see that attached to the proof of claim a few  
5 pages in there's a document called the Third Amended and  
6 Restated Sub-Advisory Agreement. Do you see that?

7 A Yes.

8 Q Do you know what that document is? Generally?

9 A Well, generally, I know what this document is.

10 Q All right. And what's your general understanding of the  
11 document?

12 A This is an advisory agreement that -- the only thing that  
13 I know, I can tell you, really, about this agreement is it  
14 gives rise to and generates fees that would inure to the  
15 benefit of the Debtor.

16 Q Okay. And a few pages past that, you'll see something  
17 called a Fourth Amended and Restated Shared Services  
18 Agreement. Do you see that?

19 A Yes.

20 Q Is it your understanding that that was another source of  
21 revenue that the Debtor generated when it had this agreement  
22 in place with Acis?

23 A Yes.

24 Q Okay. Do you have an understanding as to, you know,  
25 ballpark, what the annual fees were that the Debtor received

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1 pursuant to these agreements prior to the Acis bankruptcy?

2 A Well, I think, prior to the bankruptcy, it was more, and  
3 perhaps significantly more, than it is today. It may have  
4 been in the \$12 million range per annum. I think it's less  
5 than that today.

6 Q Okay. And can you turn to Exhibit 5, please? Is that  
7 another proof of claim that was filed in the bankruptcy case,  
8 the Acis bankruptcy case?

9 A Yes. This is a little bit different. This is an  
10 application for an administrative expense claim. The prior  
11 proof of claim that we looked at related to a pre-petition  
12 claim that the Debtor had, then a gap period claim that the  
13 Debtor had, and this is post-petition. So this is an  
14 administrative claim. It's basically for the same services,  
15 but just different time periods.

16 Q Okay. And who was responsible for preparing Exhibits 4,  
17 5, and 6?

18 A Ms. O'Neil and the Foley firm.

19 Q Okay. And has the Board reached a conclusion that it's in  
20 the Debtor's best interest to retain Foley on a post-petition  
21 basis to prosecute these claims?

22 A It has.

23 Q And why -- what's the justification for that? Why did the  
24 Board reach that decision?

25 A Well, we believe it's in the best interest of the Debtor.

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1 Obviously, a couple of things there. I realize we may have a  
2 very long road ahead of us with respect to these things. But  
3 the overall aspirational goal is to have an income stream  
4 that's associated with these agreements. The goal is to have  
5 an amount of money out there that's available to pay our pre-  
6 petition claims, the gap claims, the administrative claims,  
7 while at the same time acknowledging that this company has the  
8 obligation to satisfy and fulfill Mr. Terry's claim as well.

9 Q All right. Let's just focus for the moment on the three  
10 proofs of claim. The aggregate amount is approximately \$8  
11 million. Do I have that right?

12 A Yes, that's right.

13 Q And from the Board's perspective, is the -- are those  
14 claims an asset of the estate?

15 A They are.

16 Q And does the Board want to retain Foley for the purpose of  
17 trying to recover that asset?

18 A It does.

19 Q And has the Board concluded that Foley is familiar with  
20 these particular claims?

21 A Foley is familiar with these claims, yes.

22 Q And -- okay. Let's move on, then, to the second task for  
23 which the Debtor seeks approval to retain Foley, and that is  
24 with respect to the confirmation order. That's one of the  
25 tasks, right?

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1 A It is.

2 Q Okay. And this is one of the Fifth Circuit arguments  
3 that's scheduled for six weeks from now; is that right?

4 A That's correct.

5 Q Okay. And has Foley represented the Debtor throughout the  
6 proceedings that are leading up to this oral argument?

7 A It has.

8 Q And did Foley prepare all of the briefing in connection  
9 with the arguments?

10 A It did prepare the briefing. It did that, in some  
11 respects, along with Lynn Pinker.

12 Q Okay. Did you personally review the Debtor's briefs that  
13 were filed in connection with the appeal?

14 A I have reviewed those.

15 Q Okay. Have you reviewed every single piece of the record  
16 on appeal?

17 A I would doubt that I have.

18 Q Okay. Do you have a general understanding of the nature  
19 of the appeal? Of -- and this would --

20 A Are we talking now about the confirmation appeal?

21 Q Yes. Just the confirmation. Yeah.

22 Q Well, the appeal has basically two broad elements, and the  
23 first is an argument that the plan was not brought in good  
24 faith. Section 1129(a)(3). And that goes back to the  
25 arbitration issue. Generally speaking, that because -- the

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1 allegation is that because Mr. Terry refused to arbitrate,  
2 then the plan was tainted by that lack of good faith. And the  
3 second issue, broad issue that's involved in that appeal has  
4 to do with, oh, the injunction, the breadth and scope of the  
5 injunction, which the Debtor contends is -- was improper.

6 Q And if the Fifth Circuit reverses the underlying decision,  
7 has the Board made a determination of the possible benefits  
8 that the Debtor may receive?

9 A Well, there's two aspects of that appeal. One would be a  
10 narrower decision. I suppose, if it's just related to the  
11 injunction, it's -- it's hard to quantify exactly what that  
12 would mean.

13 Q Okay.

14 A The bigger issue, of course, has to do with the  
15 arbitration. And if the -- theoretically, at least, the  
16 arbitration, if the Fifth Circuit agreed on the issue of  
17 arbitration, then the argument would be that we would -- that  
18 in the arbitra... well, it is true to say that -- well, I  
19 think I'm kind of getting ahead of myself here.

20 Q You are, just a bit. Let's just focus on the confirmation  
21 appeal. That's been consolidated for oral argument purposes  
22 --

23 A It has.

24 Q -- with the appeal of the involuntary; is that right?

25 A That's correct.

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1 Q Okay. And just to sum up this piece of it, did Foley  
2 represent the Debtor with respect to all of the underlying  
3 proceedings?

4 A It did.

5 Q And why does the Board believe it's in the Debtor's best  
6 interest to retain Foley to conduct the oral argument and to  
7 finish up this proceeding?

8 A Well, first of all, I think the Court would agree with me  
9 that Foley is a very competent law firm. It's competent to do  
10 the work that they've been charged to do.

11 Second, pretty much all the work on the appeal is already  
12 in the can. The only thing that's left to be done at this  
13 point in time is to make the oral argument. Obviously, if we  
14 didn't go forward with the Foley firm, we'd have to find  
15 somebody who could make the argument. So, we would -- but we  
16 would lose the benefit of Foley's experience that they have in  
17 the case so far.

18 I think there will be a cost element that would be  
19 associated with bringing somebody new up to speed with respect  
20 to this.

21 So, those, generally speaking, are the benefits that we  
22 see.

23 Q Okay. Let's turn then, finally, to the Neutra appeal. Do  
24 you have a general understanding of that matter for which the  
25 Debtor seeks to retain Foley?

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1 A Yeah. The Neutra appeal, what happened in Neutra is that  
2 Neutra, to my understanding, moved to intervene in the  
3 involuntary proceeding. I think that intervention was denied.  
4 And so that appeal has to do with the fact that Neutra  
5 contends that it should have been permitted to intervene, that  
6 the matter of collections should have been arbitrated.

7 I think that one of the issues in there is this -- in that  
8 appeal is who decides on the issue of arbitrability. Is it  
9 this Court, or is it the arbitrators themselves?

10 So, those are the issues that are present in the Neutra  
11 appeal.

12 Q Okay. Is the Debtor named a party to the appeal?

13 A The Debtor is not a named party in the Neutra appeal.

14 Q But the Board nevertheless wants to retain Foley on a  
15 post-petition basis to prosecute that appeal; is that right?

16 A That's correct.

17 Q And why is that?

18 A Well, I think both -- we recognize and I think the Fifth  
19 Circuit recognizes as well that these two things, that these  
20 two appeals kind of go hand-in-glove. The 1129(a)(3) argument  
21 basically is dependent upon the arbitration issue, which is  
22 fleshed out in the Neutra appeal.

23 And so, at the end of the day, the way that the Board sees  
24 this is that the Debtor is the most immediate beneficiary of  
25 the economic benefit of the Neutra appeal. We see the



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1 possibility of an income stream there. We see the possibility  
2 of the ability to pay our claims in the Acis case. And I  
3 think -- one of the things I think that is of particular focus  
4 when it comes to all of this litigation is the fact that, as I  
5 understand it, Mr. Terry started out with an \$8 million claim,  
6 and I think he bid \$1 million of that claim for the interest  
7 that he got in Acis, which reduced it, say, to \$7 million.  
8 And I think Mr. Terry's interest now over time I believe it's  
9 been reduced to somewhere between \$4 to \$6 million. So  
10 that's, that's a claim.

11 But in this case, Mr. Terry has filed a proof of claim for  
12 \$70 million. And my understanding from our visit with Mr.  
13 Terry and his counsel is that that claim could get up to \$300  
14 million. And so, as a board, we look at that and what we're  
15 concerned about is the migration, the alleged migration of a  
16 tremendous amount of value from Highland down to Acis. So, at  
17 the end of the day, it doesn't really matter who you regard as  
18 the ultimate equity owner of Acis, whether it's Mr. Terry or  
19 whether it's Mr. Dondero: The migration of that value  
20 downstream to Acis is of no real benefit to Highland Capital  
21 at all.

22 Q Is this one of the issues that the Board discussed with  
23 the Committee last week in connection with this motion?

24 A Yes. It is.

25 Q Okay. And let's just go back to the income stream for a

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1 second. The income stream that the Board is hoping it will  
2 get if the decision is reversed, is that income stream derived  
3 from the two agreements that we just looked at?

4 A It is.

5 Q So those are the two very agreements that the Board would  
6 look to have reinstated if it were to succeed on the appeal;  
7 is that right?

8 A Yes.

9 Q Now, does the Board know exactly the form of relief the  
10 Fifth Circuit is going to grant?

11 A I have no earthly idea.

12 Q Right? But has the Board made a determination that the  
13 outcome of Neutra obtaining control of Acis is one  
14 possibility?

15 A It's certainly a possibility.

16 Q And is that the potential benefit that the Board focused  
17 on in deciding to pursue this motion?

18 A Yes. I mean, I'm glad to adopt the percentages that Mr.  
19 Terry's counsel has mentioned today. I guess if the cost-  
20 benefit analysis is that we're going to pay a couple hundred  
21 thousand dollars here to get to the end of the road, and the  
22 benefit is millions of dollars, well, even if our chances are  
23 only ten percent, I think that's a shot worth taking.

24 Q Thank you very much. If the Fifth Circuit reversed,  
25 because this is a point that was also made in the Acis

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1 opening, what would happen to Mr. Terry's claim? Or what's  
2 your understanding or what's the Board's view as to whether or  
3 not it would intend to satisfy Mr. Terry's claim?

4 A I know, speaking on my behalf, that I'd -- the claim that  
5 Mr. Terry got through arbitration I regard as a valid claim.  
6 I think it's one that would have to be addressed no matter who  
7 is in charge of paying the obligations of Neutra.

8 Q Has the Board concluded that it's in the Debtor's best  
9 interest to retain Foley for the purpose of prosecuting the  
10 Neutra appeal, or at least in issuing the oral argument?

11 A Yes.

12 Q Okay. And when is the argument scheduled for?

13 A March the 30th.

14 Q And is the fact that that's all that's left with respect  
15 to this aspect of the engagement a factor that the Board took  
16 into account in its decision?

17 A Yes.

18 Q Has the Board reached a decision as to who the real  
19 economic party in interest is with respect to the Neutra  
20 appeal?

21 A Yes. We believe ultimately that our Debtor would bear the  
22 most economic interest in the outcome. And, really, because  
23 of the amount of the obligations that are owed, both to Mr.  
24 Terry, to Highland Capital, by the time that you have this  
25 kind of runoff of all the revenue streams, I'm not really sure

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1 that there would be anything left for either Mr. Dondero or  
2 Mr. Okada.

3 Q So, --

4 A That's -- that's a view from 50,000 feet, not even 30,000  
5 feet.

6 Q Okay. Well, let's talk about the specific benefits,  
7 potential benefits, if it's reversed on appeal. Does the  
8 Board believe it's possible that the two contracts get  
9 reinstated?

10 A It is possible.

11 Q And is that a motivating factor in supporting this motion?

12 A It is.

13 Q What would happen to the \$8 million claim that the Debtor  
14 has against Acis right now in the Acis bankruptcy? Does the  
15 Board have a view as to what would happen to that?

16 A It would be our aspiration to collect that claim on behalf  
17 of our client, which is Highland Capital Management.

18 Q And would -- is it the Board's expectation that if it was  
19 in that position it would get paid hundred-cent dollars,  
20 rather than at least a portion of it as a general unsecured  
21 claim?

22 A Again, that would be our aspiration.

23 Q Uh-huh. What would happen to the adversary proceeding?  
24 Do you have an understanding as to what would happen in the  
25 adversary proceeding with respect to Mr. Terry if the Fifth

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1 Circuit reverses and Neutra regains control of Acis?

2 A Well, I'm assuming -- I'm assuming that that adversary  
3 proceeding would go away.

4 Q Okay. And would that -- is that a potential benefit to  
5 the estate?

6 A That would be a benefit to the estate if it did.

7 Q And do all of the factors that we just discussed go into  
8 the cost-benefit analysis that the Board did in deciding to  
9 pursue only these three very limited aspects of the  
10 engagement?

11 A Yes.

12 Q Okay. Has the Board considered the potential harm to the  
13 Debtor if the motion is denied?

14 A We have.

15 Q And have -- can you share with the Court the issues that  
16 the Board has identified as potentially being adverse if the  
17 motion is denied?

18 A It's really just the other -- the flip side of the coin of  
19 benefit, which is added expense, loss of the experience that  
20 the Foley firm has, perhaps delay of time in finding somebody  
21 else, bringing them up to speed, not just with respect to the  
22 two appeals but with respect to the proof of claim. And there  
23 may be others that I'm not thinking of right now.

24 Q Did the Board consider the potential loss of the  
25 institutional knowledge that Foley has and the potential

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1 adverse impact it would have on the quality of the oral  
2 argument?

3 A It did.

4 Q Okay. So, two of the three matters that the Debtor seeks  
5 to retain Foley for are appeals to the Fifth Circuit; is that  
6 right?

7 A Yes.

8 Q And did those matters originate in this courtroom?

9 A They did.

10 Q And you were colleagues with Judge Jernigan at one time,  
11 weren't you?

12 A Yes. We were bench colleagues for twelve years.

13 Q And do you believe Judge Jernigan is a good judge?

14 A I do.

15 Q Do you believe she's a fair judge?

16 A I do.

17 Q Do you believe she tries to get it right every single  
18 time?

19 A I know she tries to get it right every time.

20 Q So then why is the Board seeking to prosecute these  
21 appeals of Judge Jernigan's decision?

22 A Well, it's in the best interest of our client to do that.  
23 And I have not -- I have to say there's always a little bit of  
24 discomfort that comes with something like this, but I do know  
25 this from my time on the bench, and that is that when you take

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1 the job that Judge Jernigan has, you take it with full  
2 understanding of how the system works. And in the system,  
3 half the people lose at any one given time. And when you  
4 lose, you tend to be disappointed in the result, and the  
5 result of that is that you get the right to go to the next  
6 court and have someone say that the judge got it wrong.

7 So those of us that take the bench understand that that's  
8 the system, and I don't think -- for the most part, we're not  
9 threatened by that. And so I, you know, as uncomfortable as  
10 this may -- this may put -- a position it may put me in from  
11 time to time, I think that -- I think Judge Jernigan  
12 understands the roles that we all play in this system. And so  
13 --

14 Q Just, okay, just to summarize: If the motion is granted,  
15 what's the absolute worst-case scenario here for the Debtor?

16 A I'm sorry. Would you say that again?

17 Q If the motion is granted and the Debtor is allowed to  
18 retain Foley for the three tasks which you have described, do  
19 you have an understanding as to what -- what's the worst that  
20 could happen? They'd have to pay Foley's fees, right?

21 A We'd have to pay -- well, subject to Judge Jernigan's  
22 approval, --

23 Q Right.

24 A -- those fees would be paid.

25 Q And subject to everybody's opportunity to object, right?

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1 A Right.

2 Q But if the fees were paid at a hundred percent, nobody  
3 objected and Judge Jernigan approved of them, what's the  
4 maximum exposure that the Debtor has from this?

5 A I think Foley has about \$311,000, I believe, right now in  
6 time. And I think they would probably have about maybe  
7 another \$100,000 more. And I know -- I hate to scoff at the  
8 notion that \$400,000 is a lot of -- is not a lot of money.  
9 But, you know, in the grand scheme of things in this case,  
10 it's -- I won't say it's a rounding error, but it's not a lot  
11 of money.

12 Q And forget about, I mean, not forget about, but in  
13 addition to its relative size to the overall case, how does  
14 that compare to the relative economic benefit that the Debtor  
15 believes it will recover if the appeal is successful?

16 A Well, I think the cost is -- the cost is less than half a  
17 million, and the potential benefits are in the millions.

18 MR. MORRIS: Okay. Just one moment, Your Honor, if I  
19 may?

20 THE COURT: Okay.

21 (Pause.)

22 MR. MORRIS: All right. Just a few more questions,  
23 Your Honor.

24 THE COURT: Okay.

25 BY MR. MORRIS:



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1 Q Mr. Nelms, did Neutra pay a portion of the fees, Foley's  
2 fees prior to the petition date in connection with an April  
3 litigation? Do you know?

4 A If they did, I'm not aware of it.

5 Q Okay. Do you know what would happen to the appeal if  
6 there was no funding for the appeal?

7 A Well, I think I know what the result of the appellant not  
8 showing up for an appellant argument would be.

9 Q And what would that be?

10 A Well, I think that would be a pretty quick resolution.

11 Q Do you think the case would be dismissed, the appeal would  
12 be dismissed?

13 A I think so.

14 Q And would that be the loss of a potential material benefit  
15 and asset of the Debtor's estate?

16 A It would be.

17 Q Can you think of any way to ensure the appeal is  
18 prosecuted today other than making sure the Debtor funds it?

19 A I'll put it this way. I think the most certainty can be  
20 added to this case by having the Debtor fund this matter  
21 through the end of March.

22 Q And from --

23 A I think that's -- that's -- for the time being, that's the  
24 easiest, most simple path.

25 Q And you say for the time being. Has the Board reached an

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1 agreement to never request, from Neutra or anybody else,  
2 contributions for the funding of this case?

3 A No. Ultimately, there is going to be at some point in  
4 this case a settling of accounts between the Debtor and Mr.  
5 Dondero, just as there are -- will be a settling of accounts  
6 between the Debtor and other parties in interest. We, as the  
7 Board, have just chosen not to have that fight today.

8 Q And why did the Board reach that decision?

9 A Because we just thought it was in the best interest of the  
10 Debtor to proceed that way.

11 Q And is that because you need this appeal argued on March  
12 30th?

13 A It is.

14 Q And that's because of all of the potential benefits that  
15 you've identified; is that right?

16 A Right.

17 Q Okay.

18 MR. MORRIS: I have no further questions, Your Honor.

19 THE COURT: Okay. Cross?

20 MR. LAMBERSON: Yes, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. LAMBERSON:

23 Q Good morning, Mr. Nelms.

24 A Good morning.

25 Q How's it to be on that side of the bench?

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1 A Not so fun.

2 Q It's not great, right?

3 MR. LAMBERSON: And Your Honor, we have an exhibit  
4 notebook, which we're not -- we're not going to use all these  
5 exhibits. We actually -- you'll notice that there are some  
6 empty tabs in here. We downsized the exhibits from the  
7 exhibit list, and I'm not going to use all these. So I'll  
8 just introduce them as I get to them.

9 THE COURT: Okay.

10 BY MR. LAMBERSON:

11 Q Let me pick up on your last point.

12 MS. CHIARELLO: Your Honor, may we approach? We have  
13 binders.

14 THE COURT: You may.

15 BY MR. LAMBERSON:

16 Q So, let me pick up on your last point, Mr. Nelms. So, who  
17 -- who owns Neutra?

18 A Well, if you follow the stream all the way up, it is owned  
19 75 percent by Mr. Dondero and 25 percent by Mr. Okada.

20 Q Okay. And Mr. Dondero is one of the richest men in  
21 Dallas. Correct?

22 A I don't know.

23 Q Presumably? Mr. Okada is also one of the richest men in  
24 Dallas?

25 A I don't know. I haven't lived in Dallas in 17 years.

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1 Q Okay. Fair enough. But they can't -- they can't pay the  
2 litigation costs for their own entity?

3 A Well, I don't know that they -- whether they can or  
4 whether they can't.

5 Q Right. So, are you familiar with an entity called  
6 Highland CLO Funding?

7 A Vaguely, yeah.

8 Q Okay. And Highland CLO Funding is one of the appellants  
9 in the appeal of the confirmation order, correct?

10 A That's correct.

11 Q Okay. And one of the issues on appeal is actually the  
12 plan injunction that's embedded in the confirmed plan,  
13 correct?

14 A That's correct.

15 Q Right. And is your understanding that that's really  
16 Highland CLO Funding's main appeal issue?

17 A I think it probably would be, yes.

18 Q Okay. And is there any reason that Highland CLO Funding  
19 can't pay Neutra's legal fees to have -- have another  
20 appellant in the Fifth Circuit?

21 A I don't know the answer to that question.

22 Q Okay. So, let me -- let me -- I'm going to try to keep  
23 this coordinated, but my notes are a little bit over the  
24 place, so I apologize in advance if I move around a little  
25 bit.

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1       So, you had testified earlier that -- and I'm just trying  
2       to synopsize your testimony -- that you -- that the Board  
3       believes the primary benefit of paying Neutra's legal expenses  
4       related to the order for relief appeal and the confirmation  
5       appeal is the income stream that would be evidenced by the  
6       sub-advisory agreement, right?

7       A     Yes.

8       Q     Okay. And I'm -- when I say sub-advisory agreement, I'm  
9       talking about this is the attachment to the Debtor's Exhibit  
10      4, which is the proof of claim.

11      A     Right.

12      Q     Right? And so it's your understanding that the way that  
13      works is Acis Capital Management, my client, is the portfolio  
14      manager for a bundle of CLOs, right?

15      A     That's my understanding.

16      Q     And that before the Acis bankruptcy, the sub-advisory  
17      agreement allowed Highland Capital Management to sub-advise  
18      those CLOs for a fee, correct?

19      A     That's correct.

20      Q     Okay. So, I'm going to focus on the confirmation appeal.  
21      So, you understand that the plan injunction prevents the  
22      liquidation of the CLOs and the Acis portfolio management  
23      agreement?

24      A     That is my understanding.

25      Q     Okay. And the reason that, frankly, we had to get the

Nelms - Cross

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1 plan injunction is because HCLOF three times tried to  
2 liquidate, redeem the CLOs, including twice in the bankruptcy  
3 case?

4 A I understand that was an issue. But -- I have a general  
5 understanding as to what you're saying, but not a specific  
6 understanding. But I'm not disagreeing with you.

7 Q Yeah. Okay. And so if the plan goes away, the plan  
8 injunction goes away, then is there any reason to think that  
9 HCLOF isn't going to liquidate the CLOs?

10 A I would not know.

11 Q And in that case, there's not going to be any cash flow  
12 under the portfolio management agreements or the sub-advisory  
13 agreements, right?

14 A If you're asking me if that's a possibility, I'd say it's  
15 certainly within the realm of possibilities.

16 Q Okay. So, staying on the confirmation appeal, so let's --  
17 let's assume that, for whatever reason, the Fifth Circuit  
18 decides that the confirmation order needs to be reversed and  
19 they send it back down to Judge Jernigan and say, "Try again."  
20 Would you agree that that would effectively reactivate the  
21 Acis case?

22 A Well, I don't know, because, you know, one of the issues  
23 in the appeal is who gets to make the decision with respect to  
24 arbitrability. Because I know that it's the Appellants'  
25 position that the decision as to whether or not it should be

Nelms - Cross

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1 arbitrated, something such as collections, should they go to  
2 be decided by the arbitrator, --

3 Q Let me stop you, just to be clear. I'm talking about the  
4 confirmation appeal, the appeal of the confirmation order.

5 A Uh-huh.

6 Q Right? Okay. I'm not talking about the order for relief  
7 appeal.

8 A I may be conflating the two, so I'm sorry.

9 Q Yeah, yeah, and I -- and it's -- yeah, it's -- but it is  
10 confusing. But I'm talking about the confirmation appeal. So  
11 the appeal of the Court's confirmation order confirming the --  
12 I think was the third amended plan. Okay? So, I'm focusing  
13 on that appeal only. If the Fifth Circuit says, "Nope. Try  
14 again," then you would agree with me that that effectively  
15 reactivates the Acis Chapter 11 case?

16 A Well, I think it depends. If you -- would you like me to  
17 explain why I think it depends?

18 Q Yeah. Go ahead. I don't -- because, I mean, honestly,  
19 I'm not exactly sure what happened, so I would actually -- I  
20 would like your opinion.

21 A Well, given that the first issue in the confirmation  
22 appeal is the issue of good faith, and the foundation of that  
23 pretty much is the whole arbitration issue, if the Fifth  
24 Circuit were to reverse on that basis, then I don't  
25 necessarily know that it would go back to the Bankruptcy

Nelms - Cross

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1 Court.

2 If it was reversed just on the narrower issue with respect  
3 to the injunction, and maybe whether the injunction was too  
4 broad or something like that, --

5 Q Uh-huh.

6 A -- and that was the only basis for reversal, I would agree  
7 with you it would go back to Bankruptcy Court.

8 Q Okay. So there's some possibility that a result of the  
9 confirmation appeal is that the Acis Chapter 11 case is  
10 reactivated and we're back in front of Judge Jernigan on that  
11 case, too?

12 A That would be a possibility.

13 Q Okay. And then you'd get to talk with Mr. Phelan, right?  
14 That would be fun.

15 A Right.

16 Q So, so how much money did Highland Capital spend in the  
17 Acis bankruptcy case?

18 A I don't know.

19 Q Was it -- it was millions and millions, right?

20 A I don't know, but I'm -- I'm assuming it exceeded a  
21 million.

22 Q Okay. Well, aren't there -- aren't there claims of unpaid  
23 fees just in the Top 20 list, which we'll point to here in a  
24 minute, in the millions of dollars that relate to the  
25 attorneys that represented Highland in the bankruptcy -- in



Nelms - Cross

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1 the Acis bankruptcy case?

2 A I don't know.

3 Q Okay. So, why, you know, assuming that a result of the  
4 confirmation appeal is that the Acis bankruptcy case is  
5 reactivated, how is that in Highland's best interest? And I'm  
6 not talking about Neutra, and I'm not talking about HCLOF.  
7 I'm talking about Highland.

8 A Well, the -- what would be in our best interest would be  
9 to once again control the sub-advisory agreement and to  
10 generate revenues for the benefit of this estate. Use those  
11 -- that revenue stream both to address any claims that  
12 Highland might have, as well as Mr. Terry. That would be the  
13 benefit as we see it.

14 Q Right. But by the time of the confirmation order, --

15 A But if your question is, oh, but you're going to be  
16 involved in a lot of other litigation and so how does that  
17 benefit, then I guess my answer to that is it's a -- my answer  
18 is a "Yes, but," and but may exceed the scope of your  
19 question, so I won't --

20 Q Okay.

21 A -- I won't give you the but answer unless you want me to  
22 do it.

23 Q That's fine. I just -- if we go back, if we go back to  
24 where we were before confirmation, I mean, I'm not talking  
25 about the order for relief, I'm talking about confirmation,

Nelms - Cross

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1 the sub-advisory agreement had been terminated. Highland had  
2 been fired and Brigade was managing everything.

3 A Right.

4 Q So, there wouldn't be any cash flow going to Highland  
5 based on the -- just the reversal of the confirmation order.

6 A Well, what would have to happen, of course, is that Neutra  
7 would have to -- would have to appoint us as -- would have to  
8 allow us to come in under the sub-advisory agreement to  
9 perform those services.

10 Q Right. Except that there's a trustee, right? Robin  
11 Phelan was in charge of everything.

12 A Well, you're assuming there's still a bankruptcy.

13 Q Right. Yeah. Well, I am. I mean, again -- and maybe I'm  
14 being simplistic about this, but if the confirmation order is  
15 reversed, --

16 THE COURT: Counsel is standing. Do you have an  
17 objection?

18 MR. MORRIS: Yeah. I do, Your Honor, to this whole  
19 line of hypothetical questions. We do understand, I think  
20 everybody understands, that we don't know if the appeal will  
21 be granted. I think we do all understand that we don't know  
22 what the form of relief, the exact form of relief will be.  
23 But the testimony here is that the Board has decided that one  
24 possible form of relief is that -- is that Neutra will regain  
25 control of Acis and get these contracts reinstated, get the

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1 adversary proceeding dismissed, and get paid on its \$8 million  
2 claim.

3 If there's questions about that, I think it's relevant,  
4 but I don't know why we're spending a lot of time on  
5 hypotheticals with a fact witness.

6 THE COURT: But the --

7 MR. MORRIS: Not an expert witness.

8 THE COURT: The business judgment of the Board of the  
9 Debtor is at issue here, correct?

10 MR. MORRIS: Correct. Absolutely.

11 THE COURT: Don't these hypotheticals go to, is  
12 reasonable business judgment being exercised here?

13 MR. MORRIS: I think he has to lay a foundation and  
14 say, Is this -- is this a hypothetical you considered? Is  
15 this a hypothetical that you considered? Because we're just  
16 -- this is like expert testimony almost. There is no evidence  
17 that any of these factors were considered. And at the end of  
18 the day, there is no dispute that the scenario that the Board  
19 is saying is worth the investment, basically, is also a  
20 possibility.

21 THE COURT: Okay. I overrule the objection.

22 MR. LAMBERSON: Okay.

23 THE COURT: You can proceed.

24 MR. LAMBERSON: And Your Honor, I'm just about done.

25 THE COURT: Okay.

Nelms - Cross

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1 BY MR. LAMBERSON:

2 Q So, okay. So, we -- but we can agree that -- okay. Let  
3 me -- let me hopefully do this. Okay. So, I mean, I think  
4 that's fine for the confirmation appeal, so now I want to talk  
5 about the order for relief appeal. Right? So this is the  
6 appeal of the order for relief or the -- and I stated this  
7 earlier to the Court, but the sole substantive issue in that  
8 appeal is whether this Court should have compelled the order  
9 for relief to arbitration. Is that right?

10 A The sole substantive issue? I think, if you paint with a  
11 broad brush, yeah. I would agree with you, yes.

12 Q Okay. Well, and again, I'm not trying to --

13 A I know. So, --

14 Q I'm not trying to trap anybody. The three issues --

15 A And I'm not trying to be evasive, either.

16 Q Yeah.

17 A Yeah.

18 Q Are the standing issue, which, in my mind, isn't really a  
19 substantive issue. And then there's the issue about the  
20 arbitration of the order for relief. And then, finally, as I  
21 mentioned, we've raised a waiver argument that basically, if  
22 they had a right to arbitrate, which we think they don't, they  
23 waited too long to raise it. Right? Those are the three  
24 issues. Correct?

25 A That's correct.

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1 Q Okay. So, let me ask you. And I'm not going to -- I'm  
2 not going to hold this against you at the Fifth Circuit level,  
3 but, I mean, do you -- do you think an order for relief is  
4 subject to arbitration?

5 MR. MORRIS: Objection, Your Honor. Calls for a  
6 legal conclusion.

7 THE COURT: Overruled.

8 MR. LAMBERSON: Sure it does.

9 THE COURT: Overruled.

10 THE WITNESS: I think the -- I think it's a -- I  
11 think there's a colorable argument.

12 BY MR. LAMBERSON:

13 Q Uh-huh.

14 MR. MORRIS: Objection withdrawn.

15 BY MR. LAMBERSON:

16 Q So you don't think *National Gypsum* and *Gandy* would apply  
17 to an involuntary petition and order for relief?

18 A Well, I'll put it this way. I guess they'll apply if the  
19 Fifth Circuit tells us they do.

20 Q Right.

21 A That's as much as I can tell you.

22 Q Okay. So, so if that ruling is reversed, right, as I  
23 mentioned earlier -- and let me ask you, actually, another  
24 thing. So, how often, when you were a judge, how often were  
25 -- I shouldn't say how often -- how many times were your

Nelms - Cross

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1 rulings reversed? Just roughly?

2 A Was I reversed?

3 Q Yeah.

4 A I think six.

5 Q Not very many claims, right?

6 A No.

7 Q So how many times was there a reverse and a render?

8 A I'm sorry. Say again?

9 Q How many times was there a reverse and a render, where  
10 nothing came back to you, that basically the higher court just  
11 said, It's done?

12 A Well, it was rendered every time except on one occasion,  
13 and that --

14 Q Uh-huh.

15 A -- *Stern v. Marshall* had just been decided, and so --  
16 gosh, I can't remember the district judge.

17 Q Okay.

18 A One of the judges reversed but sent it back to me to  
19 reconsider it under the light of the ruling in *Stern v.*  
20 *Marshall*, a jurisdictional issue. So, in all those instances,  
21 it was rendered.

22 Q Okay. So there was nothing -- there was no issue that  
23 came back to you? The case was just resolved?

24 A No. No issue came back to me.

25 Q Okay.

Nelms - Cross

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1 A No, you know what, there was a second one. I think the  
2 second one was *In re Mirant. Commerzbank versus -- MCAR v.*  
3 *Commerzbank*. That came back as well.

4 Q Right. Okay. So, again, but focusing on the order for  
5 relief appeal, one possibility is that the Fifth Circuit says,  
6 okay, this may be subject to arbitration, and sends it back to  
7 Judge Jernigan to make additional findings, apply a different  
8 standard, right? That's possible, right?

9 A That's possible.

10 Q Okay. So, in that case, nothing necessarily came out of  
11 the appeal, right? Like you're just basically back in front  
12 of her on the same issues?

13 A Well, I -- that may very well be the case, but --

14 Q Okay. Well, let's assume that the Fifth Circuit does  
15 reverse and render. Wouldn't -- isn't what they would render  
16 would be a -- compelling this case to arbitration? Right?  
17 Not that the bankruptcy goes away, disappears. It would  
18 basically be, "Should have been arbitrated. Go arbitrate."

19 A It's a good question, what the effect of reversing it  
20 would be and sending it back, remanding it. They -- I mean,  
21 one of the things that they might decide is to say that the  
22 whole issue of arbitration should be decided by an arbitrator.

23 Q Uh-huh.

24 A That's a possibility.

25 Q Right. But in that situation, the bankruptcy doesn't go

Nelms - Cross

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1 away. It just moves to a different forum, right?

2 A No, I mean, you're probably right. That, in and of  
3 itself, would not eviscerate the bankruptcy filing.

4 Q Uh-huh.

5 A That's true.

6 Q And so, in that situation, the result is -- and this is --  
7 that's, frankly, the best situation, is --

8 A But, of course, I mean -- can I go back to that? Just,  
9 I'm not sure about that. Because, after all, this was an  
10 involuntary petition.

11 Q Uh-huh.

12 A If it was a voluntary petition, then I would certainly  
13 agree with you wholeheartedly. Inasmuch as it was an  
14 involuntary petition, I'm not sure about the answer to that  
15 question.

16 Q Uh-huh. Okay.

17 A That's a good question.

18 Q But you would agree with me that a possible result of even  
19 a reversal of the order for relief appeal would just be more  
20 litigation?

21 A Yes. That's certainly a possibility.

22 Q Right. In this Court? Maybe in front of an arbitrator?  
23 Maybe both?

24 A Yes. That's possible.

25 Q Okay. All right. So, still focusing on the order for



Nelms - Cross

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1 relief appeal, but I want to go to this idea that, again,  
2 there's this cash flow stream that is going to be reinstated  
3 for the benefit of Highland Capital under the sub-advisory  
4 agreement. Okay?

5 A Right.

6 Q All right. So, before the Acis bankruptcy was filed,  
7 Dondero, and at that time, in control of Highland, were  
8 actually in the process of liquidating Acis, weren't they?

9 A Were they in the process of liquidating Acis?

10 Q Uh-huh.

11 A And I take it these are the transfers that were --  
12 concerning your client that prompted the filing of the  
13 involuntary petition itself?

14 Q Correct.

15 A Is that what you're referring to as the --

16 Q Yes.

17 A -- liquidation?

18 Q Yes.

19 A Well, I certainly know that -- I understand those  
20 transfers were taking place. Now, whether you'd call that a  
21 liquidation or not, I don't know, but I know what you're  
22 referring to --

23 Q Okay.

24 A -- and I think the answer to your --

25 Q So, --

Nelms - Cross

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1 A Yeah.

2 Q Yeah. So there were a variety of transfers of assets away  
3 from Acis before --

4 A Right.

5 Q -- the Acis bankruptcy filing, right? And, actually, are  
6 you aware that there was actually an agreement between  
7 Highland CLO Management and Acis to transfer those PMAs to  
8 HCLOF Management?

9 A No, I'm not aware of that.

10 Q Okay. And as we talked about earlier, HCLOF repeatedly  
11 attempted to redeem the CLOs, even during the Acis bankruptcy,  
12 right?

13 A I read about that in Judge Jernigan's opinion, so I'm  
14 assuming that's the case.

15 Q Right. Okay. And then -- and, in fact, if HCLOF was  
16 successful, that would liquidate the CLOs and it would  
17 effectively terminate the Acis portfolio management  
18 agreements, right?

19 A I don't know.

20 Q Okay. But if that was the case, if the portfolio  
21 management agreements went away or no longer had assets to  
22 manage, then the sub-advisory agreement would have no income,  
23 right?

24 A If you're asking me if that's something within the realm  
25 of possibilities, I suppose so.

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1 Q Okay. So, if, because of the appeal, the Acis bankruptcy  
2 -- because of the order for relief appeal, if the bankruptcy  
3 -- if the Acis bankruptcy just went entire away, just  
4 disappeared, right, so Mr. Dondero would be in control of  
5 Acis, not you, right?

6 A He would be in control. That's correct.

7 Q Okay. And so if he wanted to terminate the PMAs and enter  
8 new PMAs with Dondero Capital Management, you couldn't keep  
9 him from doing that, could you?

10 A Well, I -- no, I could not keep him from doing that.

11 Q Okay. Or if he wanted to terminate the sub-advisory  
12 agreement and enter into a different agreement, I mean, you  
13 couldn't keep him from doing that, either, could you?

14 A No, I couldn't.

15 Q Right. So what makes you think that Highland Capital  
16 Management, a debtor that he lost control of, just like Acis,  
17 would benefit from Acis's PMAs, when he was actively trying to  
18 take Acis's PMAs away from Acis?

19 A Well, I have -- I spoke to Mr. Dondero about this, and he  
20 -- I asked him the question, and he said that he would  
21 reinstate Highland under the sub-advisory agreement and the  
22 shared services agreement.

23 Q Okay. So, on that point, you did mention earlier that, as  
24 part of your -- as part of the Board's diligence, you talked  
25 with Mrs. O'Neil and you talked to Pachulski. Obviously,

Nelms - Cross

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1 you've analyzed the issues. I can tell you're familiar with  
2 all these, all of the pleadings. But you also talked with  
3 different Highland Capital employees about the litigation and  
4 the appeals, correct?

5 A I did.

6 Q Okay. Who did you talk with?

7 A Well, I have to say that the interaction with Highland  
8 employees was actually fairly abbreviated.

9 Q Uh-huh.

10 A We spoke very, very briefly about this with Isaac Leventon  
11 on the day that we were appointed. I don't know if the Court  
12 is aware of this or not, but we spoke about it very briefly,  
13 and then he was injured later that night and he really hasn't  
14 been back at the office since then. So, --

15 Q Oh.

16 A -- I would say, for the most part, I have relied mainly on  
17 Pachulski.

18 Q Okay. But you did indicate you talked to Mr. Dondero as  
19 well?

20 A I talked to him about this issue about reinstatement, yes.

21 MR. LAMBERSON: So, Your Honor, I'd like to turn to

22 --

23 THE WITNESS: Oh, you don't have to call me Your  
24 Honor.

25 THE COURT: There are two Your Honors.

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1 MR. LAMBERSON: Your Honors. How about that?

2 THE COURT: Okay.

3 THE WITNESS: Yeah, there's only one judge in the  
4 court today.

5 BY MR. LAMBERSON:

6 Q Could you turn to Exhibit 16, please? This is Acis's  
7 Exhibit 16. I'm sorry. Do you have that, Mr. Nelms?

8 A I do.

9 Q And could you identify Acis Exhibit 16?

10 A Yes. This is Official Form 204 in the current case, the  
11 one we're here for today.

12 Q Right. So it's the Top 20 List of Creditors for Highland  
13 Capital Management?

14 A Yes, that's correct.

15 Q Okay. And have you seen Exhibit 16 before?

16 A Pardon me?

17 Q Have you seen Exhibit 16 before, the Top 20 List?

18 A No, I have not seen it before.

19 Q Okay.

20 MR. LAMBERSON: Your Honor, we'd ask for the  
21 admission of Exhibit 16.

22 THE COURT: Any objection?

23 MR. MORRIS: Just on relevance grounds. Can we at  
24 least establish a foundation as to which element of 327(e)  
25 this goes to?

Nelms - Cross

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1 THE COURT: Response?

2 MR. LAMBERSON: Well, Your Honor, what I'm going to  
3 point out is that the top ten creditors, other than an insider  
4 creditor, are all litigation-based, and that the, as I pointed  
5 out in my opening, the origin of this case was a bad  
6 litigation strategy.

7 MR. MORRIS: No objection to the introduction of this  
8 exhibit for that limited purpose.

9 THE COURT: All right. It's admitted.

10 (Acis Capital Management GP, LLC's Exhibit 16 is received  
11 into evidence.)

12 BY MR. LAMBERSON:

13 Q All right. So, Mr. Nelms, you said you hadn't seen this  
14 before, but I think you'll probably be familiar with the  
15 information on it generally. So let's walk through this  
16 quickly. So, this is the Top 20 List of Creditors. The first  
17 creditor is Redeemer Committee, listed as litigation, do you  
18 see that, for about \$190 million?

19 A Yes.

20 Q And that's the arbitration award that precipitated this  
21 filing, correct?

22 A It is.

23 Q Okay. So the next claim is Pat Daugherty, litigation  
24 claim. It's \$11.7 million. Do you see that?

25 A Yes.

Nelms - Cross

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1 Q So, do you know what is Mr. Daugherty's history with  
2 Highland Capital? And try to keep it under five minutes.

3 A Yeah. Mr. Daugherty is a former employee. And I know he  
4 has some contractual disputes with the company based upon his  
5 separation.

6 Q Right. And he's a long-time litigant with Highland  
7 Capital, correct?

8 A He is, yes.

9 Q Yes. So the next one is CLO HoldCo. This is about \$11.5  
10 million. CLO HoldCo is an insider of the Debtor, correct? If  
11 you know.

12 A Is -- is it an insider? I don't know.

13 Q Okay. Well, Grant Scott, the party here, is Mr. Dondero's  
14 college roommate. Do you know that?

15 A That's my understanding, yes.

16 Q Okay. So, Creditor #4, McKool Smith, for two point --  
17 roughly \$2.1 million. Do you see this? This is for  
18 attorneys' fees incurred by Highland Capital, correct?

19 MR. MORRIS: Objection, Your Honor. I still fail to  
20 see how this is at all connected to any of the elements of  
21 327(e) or the retention of Foley.

22 THE COURT: Okay. I overrule.

23 BY MR. LAMBERSON:

24 Q So, this is -- this -- these are fees incurred by Highland  
25 Capital, you know, a variety of venues, right, including this

Nelms - Cross

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1 one, state court fights against Mr. Terry, right?

2 A I thought -- McKool Smith, I thought they were involved in  
3 the Redeemer litigation, but they may be involved in other  
4 litigation as well.

5 Q Okay. Fair enough. And do you know, this claim is  
6 disputed by the Debtor, correct?

7 A Yes.

8 Q Okay. And do you know, obviously subject to the stay, but  
9 do you know if this claim is being arbitrated or has been sent  
10 to arbitration?

11 A No, I don't know any -- no, I don't know.

12 Q Okay. That's fair enough. So, then #5 -- I'll move it  
13 along here. Meta Discovery, Meta-e Discovery, they're a  
14 litigation vendor, right?

15 A I'm sorry, would you ask your question again?

16 Q Meta-e Discovery, the next creditor. They're a litigation  
17 vendor and they provide litigation support services?

18 A I don't know what they do.

19 Q Okay. Fair enough. Foley Gardere. Obviously, that's the  
20 law firm you all are seeking to have engaged. DLA Piper.  
21 This relates to fees incurred in connection with the Terry  
22 arbitration award, correct?

23 A I think so.

24 Q Okay. Reid Collins. These are fees related to the UBS  
25 lawsuit, correct?



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1 A I don't know.

2 Q Okay. Josh and -- Joshua and Jennifer Terry. This is a  
3 litigation claim, right? This is -- this is an IRA claim,  
4 right?

5 A It is.

6 Q NWCC. This is also a litigation claim? In other words, a  
7 litigant fighting with Highland?

8 A I can only intuit that just because of the fact that it's  
9 a law firm.

10 Q Okay. Fair enough. So, out of the Top 20 -- or, out of  
11 the Top 10 Creditors, basically, they're all litigants or  
12 attorneys paid to fight litigants, with the exception of  
13 Dondero's college roommate. Right?

14 A With the exception of what?

15 Q Mr. Dondero's college roommate that has a claim based on  
16 some entity.

17 A Yes. They're -- they all have some nexus to litigation.

18 Q Okay. And let me just ask you: If you were able to  
19 completely set aside all of Highland Capital's litigation  
20 issues, right, just like -- just like the concept of the order  
21 for relief appeal makes the Acis bankruptcy go away forever,  
22 if you could snap your fingers and make all of Highland's  
23 litigation go away forever, would Highland have any financial  
24 problems at all?

25 A Well, I don't know that I know the answer to that, but I

Nelms - Cross

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1 -- but it's certainly to say that litigation up to this point  
2 has been the driving force behind its bankruptcy filing.

3 Q Okay. Fair enough. Okay. So, Mr. Nelms, would you turn  
4 -- could you turn to Acis Exhibit 27?

5 A Okay.

6 Q Do you have that?

7 A I do.

8 Q Okay. And can you identify Exhibit 27?

9 A Yes. My understanding is that this was the lawsuit that  
10 was filed by the DAF and CLO HoldCo in the Southern District  
11 of New York.

12 Q Okay. And so I had mentioned this in my opening, and I  
13 believe counsel had asked you about what we call the DAF  
14 litigation. Is this the complaint that's the basis of the DAF  
15 litigation?

16 A Yeah, that's my understanding. It is.

17 Q Okay. And I think you had testified earlier that the  
18 board was actually shown a copy of this complaint, was before  
19 it was filed, and --

20 A I wouldn't call it -- I'm sorry, go ahead, ask your  
21 question.

22 Q No, no, I -- that's fine.

23 A I wouldn't call it a board presentation. I just remember  
24 it being handed to Mr. Dubel and Mr. Dubel looking at it,  
25 asking what it was, and saying, Tell them not to do this.

Nelms - Cross

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1 Q Okay. Thank you. And -- but it's your understanding that  
2 the complaint was filed anyway?

3 A It is my understanding it was filed later.

4 Q Okay. And in fact, this has a file-stamp at the top,  
5 which I'm sure you're very familiar with. Correct? Has a  
6 PACER file-stamp at the top.

7 A Right.

8 Q Right.

9 MR. LAMBERSON: So, Your Honor, we'd ask for the  
10 admission of Exhibit 27.

11 THE COURT: Any objection?

12 MR. MORRIS: No objection.

13 THE COURT: Admitted.

14 (Acis Capital Management GP, LLC's Exhibit 27 is received  
15 into evidence.)

16 MR. LAMBERSON: And I'll be relatively quick.

17 BY MR. LAMBERSON:

18 Q I had mentioned in my opening that we -- I should say Acis  
19 was concerned that Highland Capital Management had some  
20 participation in this, and I probably should have been clearer  
21 in saying that Highland Capital Management employees had some  
22 participation in Exhibit 27. Has the Board done any  
23 investigation as to whether any Highland Capital employees  
24 were involved in the preparation of Exhibit 27 or the filing  
25 of Exhibit 27?

Nelms - Cross

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1 A No, we have not. At least, let me speak for myself. I  
2 haven't done that investigation.

3 Q Uh-huh. And your counsel had mentioned that -- I believe  
4 this is correct -- your counsel had mentioned that you all had  
5 reached out -- the Board, I should say -- reached out to Grant  
6 Scott, who's the -- who's in control of the DAF as well as CLO  
7 HoldCo, and, you know, had sort of convinced them that it  
8 probably -- to dismiss this lawsuit. Correct?

9 A Yes.

10 Q Okay. And but do you -- as far as you know, it hasn't  
11 been dismissed yet?

12 A It hasn't been dismissed. There's some kind of technical  
13 things there, and I don't know if you want to go into them or  
14 not, but it hasn't been dismissed, but I have a high degree of  
15 certainty that this is going to get dismissed.

16 Q Okay. Fair enough. And are you aware that there was  
17 already a press release issued related to this lawsuit that  
18 was picked up by various CLO publications?

19 A When you say "already," are you talking about a specific  
20 time?

21 Q Well, that -- I guess what's I'm getting at is are you  
22 aware that the filing of this lawsuit has already resulted in  
23 various articles in CLO journals, periodicals?

24 A I'm aware of it having appeared in one publication.

25 Q Okay. And so is it fair to say that the damage is already

Nelms - Cross

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1 done and that, you know, dismissal of these claims probably  
2 isn't really all that -- isn't really all that significant  
3 when they've already, you know, put it in the press?

4 A I don't know if the damage has already been done or not.

5 Q Okay.

6 MR. LAMBERSON: Give me just a second, Your Honor.

7 THE COURT: Okay.

8 (Pause.)

9 BY MR. LAMBERSON:

10 Q So, there is actually one other -- there is one point.  
11 And I told you in advance that I was afraid I might be jumping  
12 around a little bit, so I'm going to jump around a little bit.  
13 Let me go back to the order for relief appeal. So, this is  
14 the appeal of the Court's order for relief that started the  
15 Acis bankruptcy.

16 One of the things you testified about related -- on your  
17 direct testimony is one of the benefits, one of the potential  
18 benefits, understanding we don't know what's going to happen,  
19 of the order for relief appeal is that if the -- if that  
20 ruling was reversed and the Acis bankruptcy went away, then  
21 the adversary would go away, the adversary between Acis  
22 Capital Management and Highland Capital Management. Correct?  
23 A Well, yes. In my opinion, the adversary opinion -- excuse  
24 me, the adversary proceeding would go away. Would a lawsuit  
25 under TUFTA be avoided altogether by Mr. Terry?

Nelms - Cross

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1 Q Right.

2 A I don't know that it would take that away.

3 Q Okay. And that's -- you actually anticipated my question,

4 --

5 A Uh-huh.

6 Q -- which was: It's fair to say that, even if the

7 adversary went away between Acis and Highland Capital

8 Management, that the -- certain of the claims in the adversary

9 -- for example, the fraudulent transfer claims or derivative

10 claims -- would not necessarily go away because they could be

11 asserted by Mr. Terry as a judgment creditor, correct?

12 A They could, but the consequences of asserting that claim

13 outside of bankruptcy are vastly different than asserting them

14 inside of a bankruptcy case.

15 Q Uh-huh. Right.

16 A At least potentially.

17 Q And just to close the thought here, are you aware that one

18 of Acis's main arguments during the order for relief trial was

19 that we didn't need an involuntary, that Mr. Terry could just

20 go litigate all that stuff in state court?

21 A Yeah, I think so. I think I am aware of that. Yes.

22 Q Okay. So you'd agree with me that, even on your possible

23 day on the order for relief appeal, that doesn't make the --

24 what I'll call the Terry litigation, right, the judgment

25 litigation, go away?

Nelms - Redirect

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1 A No. No. The reversal on appeal would not necessarily  
2 make the Terry litigation go away.

3 Q Okay. Thank you.

4 MR. LAMBERSON: That's all I have, Your Honor.

5 THE COURT: All right. Redirect?

6 MR. MORRIS: I just have a few questions, Your Honor.

7 THE COURT: Okay.

8 REDIRECT EXAMINATION

9 BY MR. MORRIS:

10 Q Can you turn to Exhibit 16 in your binder, sir?

11 A Which one?

12 Q I guess it's the Acis exhibits.

13 A The Acis? Okay.

14 Q Yeah. The List of Top 20 Creditors.

15 A Okay.

16 Q You were taken through each and every one of those to make  
17 the point that they're largely litigation claims. Is that  
18 fair?

19 A Say again, please?

20 Q You were taken through many of those creditors to  
21 establish that --

22 A I was.

23 Q -- that the Debtor was involved in a lot of litigation; is  
24 that right?

25 A It was.

Nelms - Redirect

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1 Q Okay. And the Board was appointed on January 9th; is that  
2 right?

3 A Yes.

4 Q Did the Board have anything to do with any of the claims  
5 that are set forth in Exhibit 16?

6 A No.

7 Q Did the Board authorize the filing of any suits that are  
8 related to any of the claims that are set forth in Exhibit 16?

9 A No.

10 Q Did the Board direct the defense of any suits that were  
11 commenced against Highland with respect to Exhibit 16?

12 A No.

13 Q Okay. Has the Board been trying to diminish and eliminate  
14 litigation where it thought it was in the Debtor's best  
15 interests?

16 A It has.

17 Q And is that, for example, why the Board decided not to  
18 pursue the Winstead matter?

19 A It is.

20 Q Is that why the Board has used its efforts to try to  
21 thwart the DAF litigation?

22 A Yes.

23 Q Does the Debtor control DAF?

24 A The Debtor does not control the DAF.

25 Q Okay. Did the Debtor authorize -- withdrawn. Did the



Nelms - Redirect

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1 Board authorize the filing of the DAF complaint?

2 A It did not.

3 Q Did the Board know the DAF complaint was going to be  
4 filed?

5 A Well, I mean, I know Mr. Dubel was presented with a copy  
6 of the complaint. We had noticed that that document existed.  
7 But it came as somewhat of a surprise to us when it got filed.

8 Q It came as a surprise to you?

9 A It did.

10 Q Because that's not what was expected after Mr. Dubel said,  
11 Don't file it. Right?

12 A Right.

13 Q Okay. You were asked a bunch of questions on cross about  
14 different possibilities and results and potential orders from  
15 the Fifth Circuit on the assumption that the appeal was  
16 granted. Do you remember that?

17 A Yes.

18 Q And some of them were purported to be better or worse for  
19 the Debtor. Do you remember that?

20 A Yes.

21 Q If the appeal is not prosecuted, is there any chance that  
22 the contracts that the Board has focused on will be  
23 reinstated?

24 A No.

25 Q Is it fair to say that if the appeal is not prosecuted the

Nelms - Redirect

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1 chances of the Debtor recovering the tens of millions of  
2 dollars of revenue will be exactly zero?

3 A Well, I don't know that it's exactly zero, but severely  
4 diminished.

5 Q Yeah. How about getting paid a hundred-cent dollars on  
6 the \$8 million claim that's in the Acis litigation? If the  
7 appeal is not prosecuted, is there any chance that the Debtor  
8 is likely to recover hundred-cent dollars?

9 A Again, that possibility is severely diminished.

10 Q Uh-huh. How about with respect to terminating the  
11 adversary proceeding in the Acis litigation? If the appeal is  
12 not prosecuted, is there any possibility of that adversary  
13 proceeding just going away and being left with the arbitration  
14 that you've described?

15 A Again, a severely diminished possibility.

16 Q You mentioned that the \$8 million fraudulent transfer as  
17 part of an arbitration would be very different outside of a  
18 bankruptcy case. Do you remember saying that?

19 A I do.

20 Q Can you explain to the Court why you believe it would be  
21 different outside of a bankruptcy case?

22 A Well, it actually goes to a case that started in my court.  
23 This was the *MCAR v. Commerzbank* case in *In re Mirant*, and the  
24 issue in that case, *Mirant*, when it filed its petition in  
25 bankruptcy, was insolvent, but by the time that its bankruptcy

Nelms - Redirect

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1 concluded, Mirant was a solvent entity. And so all of its  
2 creditors were paid in full, but the trust that was  
3 established in the *Mirant* case brought some fraudulent  
4 transfer claims that were predicated on solvency, where these  
5 were constructively fraudulent as opposed to actual.

6 And so the question was, if all the creditors had been  
7 paid in full, is there standing to bring fraudulent transfer  
8 claims that would basically not benefit creditors but would go  
9 to equity?

10 I originally -- I ruled that there was no such -- that you  
11 couldn't bring such a cause of action, that the satisfaction  
12 of claims in full extinguished those claims. And I do recall  
13 that one of the interesting things about that case is that a  
14 lady named Elizabeth Warren wrote -- or proposed -- she  
15 submitted -- they submitted an expert opinion on her behalf,  
16 which I wouldn't let them file because I took the position  
17 that I was an expert, the expert in the Court.

18 And in any event, it turns out I wasn't the expert. I was  
19 reversed by Judge Means on that, who said that it's not  
20 limited. It went up to the Fifth Circuit, and the Fifth  
21 Circuit ruled the same thing.

22 So my takeaway from all of this is that, in a bankruptcy  
23 setting, as opposed to just a state court setting, that the  
24 potential recovery on account of fraudulent transfers is much  
25 broader, much more unlimited than it would be in the context

Nelms - Redirect

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1 of a state court lawsuit.

2 So, now, there may be things that would distinguish that,  
3 but that's something to be -- that's something to be troubled  
4 about if you're a director of this company.

5 Q And are these the types of things that, without, you know,  
6 just divulging privileged communications, are these the type  
7 of experiences and perspectives that you've shared with the  
8 other board members in the context of considering the various  
9 motions, the various matters for which Foley's retention is  
10 sought?

11 A Yes.

12 Q Okay.

13 MR. MORRIS: Just one second, Your Honor.

14 THE COURT: Okay.

15 (Pause.)

16 MR. MORRIS: Nothing further, Your Honor.

17 THE COURT: All right. Any recross on that redirect?

18 MR. LAMBERSON: No, Your Honor.

19 THE COURT: All right. Thank you, Mr. Nelms.

20 (The witness steps down.)

21 THE COURT: Any other evidence from Highland?

22 MR. MORRIS: Your Honor, we have had admitted our  
23 exhibits. Among those exhibits are two declarations from Ms.  
24 O'Neil, and so she's available in the courtroom today if  
25 anybody wants to cross-examine on those issues.

O'Neil - Cross

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1 THE COURT: All right. Well, I will accept those  
2 declarations as direct evidence. Any desire to cross-examine  
3 Ms. O'Neil?

4 MS. PATEL: Yes, Your Honor.

5 THE COURT: All right. Ms. O'Neil, we'll go ahead  
6 and swear you in on this today.

7 HOLLAND O'NEIL, DEBTOR'S WITNESS, SWORN

8 THE COURT: All right. Please be seated.

9 CROSS-EXAMINATION

10 BY MS. PATEL:

11 Q Good afternoon, Ms. O'Neil.

12 A Good afternoon.

13 Q Ms. O'Neil, do you concurrently represent both Highland  
14 Capital Management and Neutra, which is a Cayman entity,  
15 correct?

16 A Yes.

17 Q Okay. There are other entities that you either represent  
18 or have represented that are kind of affiliated or within the  
19 Highland umbrella; is that correct?

20 A Yes.

21 Q Okay. And that includes, for example, CLO HoldCo was one  
22 such representation. Isn't that right?

23 A Previous. Previously.

24 Q Okay.

25 A Not currently.

O'Neil - Cross

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1 Q Okay. So, and I believe you say that in your declaration,  
2 right, that you didn't -- that you no longer represent CLO  
3 HoldCo?

4 A Correct.

5 Q Okay. And when did that representation cease?

6 A It was -- it was very brief. I came into the case after  
7 the involuntary -- after the orders for relief were entered.  
8 And at that time, there had been the motion to intervene that  
9 included that entity, and it was determined to proceed with an  
10 appeal on that motion to intervene, or the denial of the  
11 motion to intervene, as well as the orders for relief.  
12 Actually, there was a compendium of orders that were appealed  
13 all at the same time.

14 And so, because that entity had also filed a motion to  
15 intervene, we had included that in the appeal. And at that  
16 time I was retained, but then by the time we kind of analyzed  
17 the issues, determined it was not necessary to proceed with  
18 that appeal, then I no longer represented that entity and  
19 disengaged.

20 Q Okay. But CLO -- to be clear, CLO HoldCo was actually an  
21 appellant for the order for relief appeal that we've been  
22 talking about today, correct?

23 A Initially, yes.

24 Q Okay. And it still remains an appellant; it just didn't  
25 file a brief in the involuntary appeal. Isn't that right?

O'Neil - Cross

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1 A It has not filed any brief. And I would have to look at  
2 the record if it even filed a notice to the Fifth Circuit. It  
3 did -- was included in the notice to the District Court. I  
4 just honestly can't recall if it was included in the -- in any  
5 notice to the Fifth Circuit.

6 Q Okay. And did you ever withdraw from your representation  
7 of CLO HoldCo in the District Court appeal?

8 A What do you mean, withdraw?

9 Q Well, I mean, you entered an appearance.

10 A You mean file a notice with the -- with the Court?

11 Q Right.

12 A I can't recall.

13 Q Okay. Ms. O'Neil, with respect to Neutra, you understand  
14 and you've heard testimony, and I believe it's in the  
15 declarations in support of the retention papers for Foley, and  
16 if you need to look at that I can direct you to the exhibit  
17 book, but it's -- is it your understanding that ultimately  
18 Neutra is owned 75 percent by Mr. Dondero and 25 percent by  
19 Mr. Okada?

20 A Yes.

21 Q Okay. And Ms. O'Neil, in connection with your  
22 representation of Neutra, who are the human beings that you  
23 interact with? Who directs your services?

24 A At -- currently? Are you --

25 Q Just on behalf of Neutra.

O'Neil - Cross

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1 A Predominantly, I get direction from Highland's in-house  
2 counsel.

3 Q Okay. And who would that be? Who are the people?

4 A The people are Mr. J.P. Sevilla, Mr. Isaac Leventon, Ms.  
5 Stephanie Vitiello. Those are the primary individuals that  
6 direct vis-à-vis Neutra.

7 Q Okay. Have you ever spoke with Mr. Dondero regarding your  
8 representation of Neutra?

9 A Yes.

10 Q Okay. And when was that? When was the last time?

11 A It has -- it's been a while. Certainly, it hasn't been  
12 since this bankruptcy was commenced. I think the last time I  
13 recall discussing that specifically is when we were together  
14 at the mediation during the course of the bankruptcy. And I'd  
15 have to look at my calendar. I can't recall exactly when that  
16 was.

17 Q Okay. And what about Mr. Okada? Have you -- when was the  
18 last time you spoke with Mr. Okada?

19 A I have never spoken with Mr. Okada.

20 Q During the course of your entire representation of Neutra,  
21 you've never spoken with Mr. Okada?

22 A That is correct.

23 Q Okay. And under -- do you have an understanding of under  
24 what authority Mr. Sevilla or Mr. Leventon or Ms. Vitiello  
25 would have to direct your legal services on behalf of Neutra?



O'Neil - Cross

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1 A Generally, yes, through the direction from the owners of  
2 Neutra.

3 Q Okay. That would be Mr. Dondero and Mr. Okada?

4 A Correct.

5 Q Okay. And it's your understanding, then, that Mr. Dondero  
6 and Mr. Okada have directed Highland's legal department to  
7 direct your services?

8 A Yes. Previously, yes.

9 Q Okay. Do you have -- is there a contract between Neutra  
10 and Highland, or --

11 A I don't know.

12 Q Okay. Did you ever ask if there was one?

13 A No, I did not.

14 Q Okay. In connection with your representation of Neutra,  
15 do you bill separately for the Neutra representation?

16 A Since the bankruptcy was -- since the Highland bankruptcy  
17 was commenced, we set up a separate task code to track the  
18 fees being incurred on the Neutra appeal. Prior to the  
19 bankruptcy, we did not have a reason to do that.

20 Q Okay. So let's talk about prior to the bankruptcy. I  
21 believe in your declaration it was disclosed that there were  
22 approximately \$2.1 million in billings relating to your  
23 representation of Highland, Neutra, and certain of the  
24 Highland Cayman entities: Highland CLO Management, Highland  
25 CLO Holdings, and HCF Advisor, amongst others. Right?

O'Neil - Cross

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1 A That sounds about right. I might want to look at the  
2 declaration just to confirm on the number, but that sounds  
3 about right.

4 Q Okay. Well, your declaration can be found under Tab 10.

5 A Okay. (Pause.) And are you referring to Paragraph 16?

6 Q Well, if you look at Page -- at the bottom, you'll see  
7 that there's page numbers, and it says Page 15 of 48. And  
8 this would be your declaration.

9 A Oh, thank you. I was looking at the --

10 Q Uh-huh. Paragraph 3.

11 A -- at the application, that's all. Correct. Yes. Thank  
12 you.

13 Q Firm-earned fees of two point -- roughly \$2.15 million,  
14 almost, correct?

15 A Yes.

16 Q Okay. And there's about \$1.4 million of that that was  
17 unpaid from the pre-petition period, correct?

18 A Correct.

19 Q Okay. And is it your testimony that, of the \$2.15 million  
20 in fees, that there was no apportionment between Highland,  
21 Neutra, and the Cayman defendants?

22 A Correct.

23 Q Okay. So, --

24 A Not -- not in my account -- not through my accounting  
25 processes. Obviously, the time entries, you could parse them

O'Neil - Cross

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1 out, if need be.

2 Q Okay. But you didn't keep your time necessarily that way,  
3 where they were already apportioned and parsed?

4 A Not under separate task codes, --

5 Q Okay.

6 A -- as we have done post-bankruptcy.

7 Q So, in connection with the billings that would have  
8 represented that \$2.15 million, were those bills submitted to  
9 Highland, to Neutra, to the Cayman defendants?

10 A They are submitted through an e-billing process that it  
11 goes through a Highland portal and -- in the aggregate. So  
12 they're submitted through that portal.

13 Q Okay. But the portal goes to Highland, correct?

14 A I do not know. I honestly -- our e-billing department  
15 handles it and I just know it goes through e-billing, an e-  
16 billing portal, and I don't know exactly. I'm assuming  
17 obviously it goes to Highland. They certainly get copies of  
18 it.

19 Q Okay. Did you or Foley ever submit a bill to Neutra?

20 A I mean, my understanding is that, going through the  
21 portal, we would go to the various parties that are affiliated  
22 with Highland.

23 Q Okay. But you've never directly sent a bill to Neutra for  
24 your representation of Neutra?

25 A As I said, it goes through e-billing, so that could be

O'Neil - Cross

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1 interpreted to go directly to them if it goes through an e-  
2 billing process.

3 Q Okay. But I'm asking, have you ever --

4 A I'm -- maybe I'm being hyper-technical, but I'm just --

5 Q Right.

6 A It's being submitted through --

7 Q I understand, but I just -- here's where I want to just  
8 direct us, is: Have you ever addressed a bill to Neutra, Ltd.  
9 care of either Mr. Dondero, Mr. Okada, or its formal business  
10 address?

11 A As I indicated, post-petition, we have been segregating  
12 them under a different task code and indicating it's Neutra.  
13 Pre-petition, it was all under the same invoice.

14 Q That was submitted to Highland only?

15 A Submitted through the e-billing process.

16 Q To Highland only, right?

17 MR. LAMBERSON: Objection to the form of the  
18 question. This has been asked about four times. The witness  
19 is very clear.

20 THE COURT: Overruled. I think she's trying to get  
21 an exact answer to her question, and she feels like she's not  
22 getting it. So, overruled.

23 THE WITNESS: Okay. Then I apologize, Your Honor.  
24 I'm not -- I just don't know technically, once it goes through  
25 the e-billing, how it's distributed on the other side. I

O'Neil - Cross

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1 just, I honestly --

2 THE COURT: I think the question is, to whom was the  
3 invoice directed?

4 THE WITNESS: In terms of the -- not where it was  
5 sent, but who it's directed to?

6 BY MS. PATEL:

7 Q Yes.

8 A It would have -- I believe it has the entities on it. It  
9 definitely has Highland on it for sure.

10 Q Okay. Does it have Neutra on it?

11 A Neutra is subject to the engagement letter, so it would be  
12 applicable to -- if our accounting department didn't  
13 technically put Neutra on it, that is not necessarily at any  
14 moment being -- as the engagement letter is -- was with all  
15 those parties. So I would have to look at the invoice, if it  
16 has all of the clients listed on there. I honestly -- I just  
17 can't remember right now.

18 Q Okay. Well, --

19 A We do have some post-petition invoices, and you'll see  
20 where they're segregated with Neutra.

21 Q You raise an interesting point. If Highland and Neutra  
22 and the other entities are all part of the engagement letter,  
23 is Neutra also liable for all of Highland's legal fees?

24 A I don't know the answer to that.

25 Q Okay. Is it your position that because Highland, Neutra,

O'Neil - Cross

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1 and the Cayman defendants are all part of the engagement  
2 letter, that Highland is responsible for Neutra's legal fees?

3 A From my firm's standpoint?

4 Q Yes.

5 A I think the, you know, our perspective is that they were  
6 -- we were primarily working for Highland, so the beneficial  
7 work, and as I think the Court knows, most of the work here  
8 was on behalf of Highland Capital Management. And it's in our  
9 engagement letter to that effect, effectively.

10 Q Sitting here today, Ms. O'Neil, post-petition, who's  
11 calling the legal shots for purposes of Neutra?

12 A The -- well, where we have been is the process with the  
13 Fifth Circuit. The Fifth Circuit schedule was already set  
14 pre-petition, and we have just been complying with the pre-  
15 petition -- or, rather, that schedule, which has rolled post-  
16 petition. And so our direction pre-petition has just  
17 continued in terms of proceeding with the briefing. And so,  
18 again, going back to who it was pre-petition, it's the same  
19 legal team giving instructions on behalf of Neutra.

20 Q Okay. And if the question were to be posed, for example,  
21 whether the Neutra involuntary or the order for relief appeal  
22 should be dismissed, for example, who would call the legal  
23 shots on that? Who would make the decision on that?

24 A To dismiss the appeal?

25 Q Yeah.

O'Neil - Cross

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1 A Not proceed with it up to this point? Despite where we  
2 are at this point, to just -- to just drop it?

3 Q Yes.

4 A It would be the owners of Neutra.

5 Q So that would be Mr. Dondero and Mr. Okada, right?

6 A Yes.

7 Q Okay. You -- Ms. O'Neil, were you in the courtroom when  
8 Mr. Demo or -- and Mr. Nelms -- when Mr. Demo made the opening  
9 statement and then when Mr. Nelms was testifying?

10 A Yes.

11 Q Okay. And you heard, again, the opening statement and  
12 then the testimony regarding the benefit to Highland of  
13 Highland paying for Neutra's legal fees in connection with the  
14 appeals, correct?

15 A I did hear that, yes.

16 Q Okay. All right. And can you, in your words, then,  
17 articulate, from your perspective as legal counsel to both  
18 entities, what the benefit is to Highland in this bankruptcy  
19 for Foley's representation of Neutra and Highland paying the  
20 bill for it?

21 A I just want to make sure I'm not, you know, getting onto  
22 attorney-client privileged discussions in terms of the  
23 benefit. I think I would agree with what has been stated in  
24 court today.

25 Q Okay. So, so, and just to kind of recap that, if I

O'Neil - Cross

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1 understand it, it's that if Neutra is successful in its appeal  
2 of the involuntary orders for relief and also its appeal of  
3 the confirmation order, then everything goes back and Highland  
4 gets this revenue stream, correct, of about \$12 million, plus  
5 it gets paid on an \$8 million, approximately, purported claim.  
6 Right?

7 A That the -- the agreements would be reinstated, which  
8 would then yield approximately that type of revenue stream as  
9 -- pursuant to the sub-advisor and sub-management agreements  
10 that were in place.

11 Q Okay. And one of the entities -- and I know that the  
12 retention application doesn't actually go to, anymore, Foley's  
13 representation of the Cayman entities, but -- that's kind of  
14 been put to the side. But you do -- and you do represent  
15 Highland CLO Management, correct, which is a Cayman entity?

16 A Correct.

17 Q All right. And it's one of the defendants in the Acis  
18 adversary proceeding, right?

19 A And that is the only engagement that we have for that  
20 party, is in conjunction with that adversary proceeding, which  
21 is stayed. So nothing is going on with that right now.

22 Q Well, I understand that, but you --

23 A Okay.

24 Q My question was, you represent Highland CLO Management,  
25 correct?



O'Neil - Cross

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1 A In that adversary proceeding.

2 Q Okay. So -- but you also represent it in connection with  
3 -- in -- generally with the bankruptcy as well, Acis's  
4 bankruptcy?

5 A There was no involvement until the adversary proceeding,  
6 until they were sued in the adversary proceeding.

7 Q Okay. And in the adversary proceeding, Highland CLO  
8 Management was sued for a few things, correct?

9 A In the adversary proceeding?

10 Q Yes.

11 A Yes.

12 Q Okay. Highland CLO Management, for example, received a  
13 \$9.5 million note that Acis was previously the holder of and  
14 that was transferred after Mr. Terry's judgment, correct?

15 A Are you asking if that was an allegation in the adversary  
16 proceeding?

17 Q Sure.

18 A I --

19 Q Right.

20 A That sounds right. That's been stayed, and I would have  
21 to defer to the -- obviously, the second amended complaint and  
22 the allegations therein. So, --

23 Q Okay. And are you aware that your client, Highland CLO  
24 Management, was also sued because it was to receive the  
25 portfolio management agreements under which Acis represents --

O'Neil - Cross

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1 or, I'm sorry, manages the Acis CLOs?

2 A That was -- that sounds like one of the allegations from  
3 that point in time.

4 Q Okay. So I guess let me -- let me ask you a slightly  
5 different way. Are you aware that there was a pre-petition  
6 agreement that was entered into and signed by Mr. Dondero that  
7 transferred the PMAs from Acis to Highland CLO Management?

8 A I cannot recall the -- all the evidence at the -- in  
9 conjunction with that at this time, but if that's one of your  
10 representations. I wasn't representing any of the parties at  
11 that time, but I do recall that there may have been some  
12 evidence presented in that regard. But I would have to look.  
13 It's been a long time. And that record is hundreds of  
14 thousands of pages. I would need to check back on that.

15 Q Okay. But if there were such an agreement, for example,  
16 that transferred the portfolio management agreements from Acis  
17 to another entity, a Cayman entity, can you agree with me,  
18 then, that Mr. Dondero's ownership interest in Neutra would  
19 really be of no import anymore because there wouldn't be a \$12  
20 million revenue stream anymore, would there, if Acis wasn't  
21 the portfolio manager of the Acis CLOs?

22 A I don't agree with the premi... at the end, when you said,  
23 if Acis isn't the CLO manager, then there would be no revenue  
24 stream from the CLOs if it's not reinstated as the -- as the  
25 manager.

O'Neil - Cross

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1 Q Okay. So you agree that if Acis isn't the portfolio  
2 manager of the Acis CLOs, there's no \$12 million revenue  
3 stream potential to Highland by virtue of Highland coming back  
4 in as the sub-advisor and shared services provider, right?

5 A Okay. Now, the -- no, I don't know that that's  
6 necessarily the case.

7 Q Well, why not?

8 A It could be appointed to be the sub-advisor, sub-manager  
9 for -- through a different entity.

10 Q Okay. So it would basically be -- but, again, going back,  
11 it would be through a different entity. Again, Mr. Dondero's  
12 ownership of Neutra would be of no import then, right?

13 A Perhaps I'm not understanding your question.

14 Q Well, --

15 A I -- it's a hypothetical, and I --

16 Q If Acis -- if Acis didn't have these portfolio management  
17 agreements, it doesn't matter if Mr. Dondero wins the Neutra  
18 appeal or not, right? Because he wouldn't have control of the  
19 Acis entity within which to redirect, through Acis, the sub-  
20 advisory and the shared services agreements, correct?

21 A He could direct it through another entity, as I think it's  
22 been well-discussed that Highland had -- Highland had the  
23 personnel to manage the CLOs. In fact, Mr. Terry was a  
24 Highland employee when he managed the CLOs. So he could  
25 certainly direct that management through another entity, even

O'Neil - Cross

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1 if it wasn't Acis. But vis-à-vis Neutra, Neutra would be --  
2 well, before the confirmation of the plan, Neutra owned Acis.  
3 So, vis-à-vis through Neutra, I believe your statement would  
4 be correct.

5 Q Okay. Ms. O'Neil, also as sort of a participant during  
6 the Acis bankruptcy cases --

7 MS. PATEL: And Your Honor, I know you're intimately  
8 familiar with all of these.

9 BY MS. PATEL:

10 Q But Ms. O'Neil, do you recall the multiple attempts during  
11 the bankruptcy case to effectuate what was called an optional  
12 redemption, which sought to liquidate the Acis CLOs?

13 A By HCLOF, I believe there were two instances, yes.

14 Q Okay. HCLOF executed those optional redemptions, correct?  
15 Mr. Bill Scott, one of the independent directors? Is that  
16 right?

17 A I believe the evidence was presented before the Court --

18 Q Okay.

19 A -- in that regard.

20 Q And during the course of the -- all of those proceedings  
21 with the optional redemptions, Highland was the ultimate  
22 advisor to HCLOF, was it not?

23 A I'm not sure I understand what you mean by the ultimate  
24 advisor.

25 Q Well, the technical contractual advisor was an entity by

O'Neil - Cross

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1 the name of Highland HCF Advisor, right? Is the portfolio  
2 manager for Highland CLO Funding?

3 A It has been a while since I looked at that org chart or  
4 those issues, so I do not recall off the top of my head.

5 Q Okay. Well, you said that you interacted, for example,  
6 with Neutra -- on your Neutra issues with JP Sevilla, Mr.  
7 Leventon, and Stephanie Vitiello, correct?

8 A Yes.

9 Q Okay. Wasn't it really, from a legal perspective, at  
10 least, Mr. Sevilla, Mr. Leventon, who were all advising  
11 Highland CLO Funding as well?

12 A I don't know the answer. You'd have to inquire of them.

13 Q So, is it your testimony, then, that Highland had nothing  
14 to do with the optional redemption notices that were issued  
15 during the course of the Acis bankruptcy cases?

16 A I'm not sure that I understand the relevance of that as to  
17 whether Highland had any -- had nothing to do with it. I  
18 think they were certainly involved and were aware. But they  
19 weren't the -- independently making those determinations.

20 Q Okay.

21 A As you know, Ms. Patel, there were directors that were  
22 involved. They testified before this Court. There -- HCLOF  
23 was represented by counsel as well. King & Spalding. So  
24 there were multiple parties involved.

25 Q Okay. So is it, again, your testimony that Highland had

O'Neil - Cross

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1 nothing to do with the optional redemption notices that were  
2 issued during the Acis bankruptcy case?

3 MR. MORRIS: Objection, Your Honor. It may be me,  
4 but I don't understand what this has to do with the Foley  
5 retention application.

6 THE COURT: Okay. We do seem like we're getting a  
7 little far afield. What's your response to that?

8 MS. PATEL: Your Honor, the contention has been made  
9 that if these bankruptcy appeals are somehow granted or in the  
10 District Court and this Court are reversed, --

11 THE COURT: Uh-huh.

12 MS. PATEL: -- that these cases are going to come  
13 back and that suddenly, magically, there's going to be a \$12  
14 million revenue stream flowing out of Acis back into Highland,  
15 and they're going to be able to collect on an \$8 million  
16 objected-to claim.

17 I'm just trying to get to how likely is that really to  
18 happen. I mean, given the course -- and again, I know Your  
19 Honor was a viewer of all of this -- of the multiple attempts  
20 to try to liquidate these assets, --

21 THE COURT: Okay. I'll allow the question, but it'll  
22 be the end of the line of questioning. Okay?

23 MS. PATEL: Understood. And Your Honor, just  
24 additionally, it's -- that's part of the appeal that Foley is  
25 handling on the confirmation appeal. As Mr. Nelms said, it's

O'Neil - Cross

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1 also based on the plan injunction.

2 THE COURT: All right. She can answer the question,  
3 but then we move on to another area.

4 MS. PATEL: Okay.

5 BY MS. PATEL:

6 Q So is it your testimony, Ms. O'Neil, that Highland had  
7 absolutely nothing to do with the optional redemptions --

8 A I did not --

9 Q -- during the bankruptcy case?

10 A That is not what I said.

11 Q Okay. So, -- and I get it. Highland CLO Funding is a  
12 different entity, and the Bankruptcy Court made findings with  
13 respect to the fact that it is controlled in every way by  
14 Highland. Do you recall that finding?

15 A Preliminary findings in conjunction with determining  
16 whether there was a likelihood of success on the merits. I do  
17 recall that --

18 Q Okay.

19 A -- those conclusions by the Court.

20 Q As a part of the bench memorandum in support of the  
21 confirmation order, correct?

22 A Yes.

23 Q Okay.

24 A Actually, I will -- I will -- I'll correct that. I'll let  
25 that -- the Court's order speak for itself. You may have said

O'Neil - Cross

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1 a few things that were more or less than what the Court's  
2 order said, so I'd just defer to what the Court's order said.

3 Q Okay. Well, part of the representation for Foley here is  
4 to represent Highland and Neutra in connection with the  
5 confirmation appeal, correct?

6 A Yes.

7 Q And part of that confirmation appeal is also -- one of the  
8 grounds there is that you're appealing the plan injunction,  
9 which the plan injunction is what stops the CLOs from being  
10 redeemed, correct?

11 A Correct.

12 Q Okay. So, how is Highland damaged by the plan injunction?

13 A I think it's fairly obvi... again, I want to not tread too  
14 much on attorney-client privilege. But, obviously, I have yet  
15 to have a client over my 30-plus years of practicing law that  
16 likes to be subject to any kind of injunction. It limits --  
17 that injunction is more than just on the -- it's a very broad  
18 injunction. So I'd like -- if I had the injunction in front  
19 of me, there's -- there's lots of restrictions under that  
20 injunction, and that is prejudicial to Highland to be able to  
21 act freely.

22 Q Able to act freely to liquidate CLOs?

23 A Among other things, as it may do in the ordinary course of  
24 business, in its opinion, that may be beneficial to his  
25 clients.



O'Neil - Cross

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1 Q Okay. Now, Ms. O'Neil, --

2 A If I may, may I add one more thing?

3 THE COURT: You may.

4 THE WITNESS: Okay. Highland, at least in that role,  
5 could not liquidate CLOs. So I think that was an improper  
6 statement. Or suggestion.

7 BY MS. PATEL:

8 Q Okay. Well, then, what specific actions that Highland  
9 would like to take is it being damaged by the injunction?

10 A I would need to look at the -- the injunction is very,  
11 very broad. So, anything that it can't do freely that is  
12 covered by the injunction is obviously a detriment to  
13 Highland.

14 Q Okay. Now, Ms. O'Neil, if you would turn to Tab 31 in the  
15 book, --

16 A All right.

17 Q -- please. And I will ask you, this is the declaration of  
18 Bradley Sharp that was in support of the order authorizing the  
19 retention of Foley Gardere. Have you had an opportunity to  
20 review this?

21 A Yes.

22 Q Any dispute with any of the statements in here?

23 A I don't recall having a -- I don't -- I think it was  
24 accurate, but --

25 Q Okay. Well, when you read it, did you have any disputes

O'Neil - Cross

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1 with the statements that were in here?

2 A I did not see it before it was filed, so -- but having  
3 read it after it was filed, I don't recall having any disputes  
4 with anything that was in it.

5 Q Okay. And I'll turn you specifically to Paragraph 13,  
6 which is found on Page 4 of 5.

7 A Okay.

8 Q And I'll -- well, let's look at this together. (reading)  
9 Prior to the petition date, the majority of Foley's and Lynn  
10 Pinker's fees and expenses were paid by a non-debtor entity,  
11 Highland CLO Funding Limited.

12 Do you see that?

13 A Yes.

14 Q Okay. And were Foley's bills sent to Highland CLO  
15 Funding?

16 A Yes.

17 Q Okay. And is -- were those bills separate and apart from  
18 the \$2.15 million that we talked about earlier that were  
19 remitted through the Highland e-billing system?

20 A Separate, yes.

21 Q Okay. About how much in fees has Highland CLO Funding  
22 paid to Foley to date?

23 A Nothing post-petition. Prior -- I mean, during -- from  
24 the inception of the representation of Highland, probably  
25 approximately -- over a million dollars, for sure.

O'Neil - Cross

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1 Q Over \$2 million?

2 A I do not believe it is over \$2 million. It's somewhere  
3 between \$1 and \$2 million.

4 Q Okay. And those separate matters that were billed to  
5 Highland CLO Funding, how did those differ from what was  
6 billed to Highland or to Neutra or to the Cayman defendants?

7 A If it was a matter that was clearly of some benefit to  
8 HCLOF, it was billed directly. Otherwise, there was an  
9 allocation billing for just the general work. And that was  
10 primarily through an indemnity agreement, as I understood it,  
11 between Highland and HCLOF.

12 Q Okay. And who did the allocation between Highland and  
13 Highland CLO Funding?

14 A I was instructed as to what the allocation should be or  
15 asked what I thought the allocation should be on any given  
16 time, and I believe it was the -- it was discussed with the  
17 board of HCLOF as to the allocation.

18 Q Okay. And who were you directed as to the categories of  
19 allocation by that you just referenced?

20 A You mean in terms of a person?

21 Q Yes.

22 A I most frequently discussed this with Mr. Sevilla, but  
23 also had conversations with Mr. Maloney, with King & Spalding,  
24 who was representing HCLOF, and occasionally would have direct  
25 conversations with Mr. Maloney and Mr. Scott and Ms. Bestwick,

O'Neil - Cross

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1 who were the two independent directors of HCLOF.

2 Q Okay. And what types of work generally either were  
3 allocated or apportioned or billed in full to Highland CLO  
4 Funding. What was the benefit there?

5 A The work was -- the work that was going on in the  
6 bankruptcy case.

7 Q Okay. But I -- I understand that it was work in the  
8 bankruptcy case because that's where Foley represented  
9 Highland and various other entities, but I'm asking you  
10 specifically: What types of categories, and I don't -- you  
11 don't have to go task by task -- but categories of work that  
12 you performed for Highland or Neutra or for the Highland  
13 Cayman defendants that benefited and were billed to Highland  
14 CLO Funding?

15 MR. MORRIS: Your Honor, I'm going to again assert a  
16 relevance objection to any of this post-petition stuff. This  
17 is an application to retain Foley on a post-petition basis  
18 for the benefits to this estate, not with respect to what  
19 happened on a pre-petition basis.

20 THE COURT: Your response?

21 MS. PATEL: Your Honor, there's been much discussion  
22 about what -- whether Neutra should have to pay this bill or  
23 whether it should not have to pay its own way here. This is  
24 -- this is, in my mind, a bit of an extraordinary application  
25 in that we're asking a debtor entity to pay for non-debtor

O'Neil - Cross

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1 representation.

2 I want to inquire as to sort of this jumbled mix of work  
3 that's been performed. There's -- clearly, Ms. O'Neil said  
4 she hasn't been paid by HCLOF post-petition, but I think we  
5 need to separate out all of these representations, who's  
6 controlling what, and how -- how these bills really should be  
7 paid.

8 THE COURT: How the allocation has worked --

9 MS. PATEL: Yes.

10 THE COURT: -- thus far?

11 MS. PATEL: Yes, Your Honor.

12 THE COURT: I overrule the relevance objection, but  
13 let me tell you a pickle we're getting into timewise. I have  
14 a confirmation hearing starting at 1:30. And we've gone three  
15 hours on this without a bathroom break. How much longer do  
16 you think you're going to need? Because we might have to stop  
17 and come back at 2:30 if you're going to need much longer.

18 MS. PATEL: Your Honor, I would say give me ten  
19 minutes and I can wrap it up.

20 THE COURT: Okay. Ten minutes.

21 MS. PATEL: Okay.

22 THE WITNESS: I'm sorry. What was the question? I  
23 apologize.

24 BY MS. PATEL:

25 Q I'm trying to remember it myself, Ms. O'Neil. The

O'Neil - Cross

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1 question was, what specifically -- what -- and I don't -- you  
2 don't have to go task by task. But categorically, what was  
3 the work that was performed that you would have billed  
4 directly to HCLOF?

5 A Prior to King & Spalding's involvement, you may recall  
6 that we were representing HCLOF as well. So there was direct  
7 bill for the work during the bankruptcy by Foley Gardere for  
8 specific work for HCLOF.

9 The -- the -- pursuant to the indemnification, as I  
10 understood it, although I never read the indemnification  
11 personally, that there would be an allocation between Highland  
12 to HCLOF for that, for work that they performed that was of  
13 benefit to HCLOF or its equity interest in the CLOs.

14 And so I was more directed as to what that allocation  
15 should be vis-à-vis the work that was going on. I think,  
16 generally speaking, because the CLOs were being impacted, as  
17 was well-discussed during the course of the Acis bankruptcy,  
18 by the issues in the bankruptcy, by the temporary injunction  
19 that were in place vis-à-vis their inability to seek an  
20 optional redemption during the course of the bankruptcy, that  
21 they were being significantly impacted by the actions in the  
22 bankruptcy, even though they were not specifically a creditor  
23 in the bankruptcy.

24 Q So you performed services on behalf of your client,  
25 Highland, that you then billed to Highland CLO Funding because

O'Neil - Cross

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1 Highland CLO Funding couldn't effectuate an optional  
2 redemption?

3 A It was -- it was in conjunction with the overall  
4 activities that were going on in the bankruptcy.

5 Q Okay.

6 A Not that specifically, no.

7 Q All right, Ms. O'Neil. I've only got a few minutes left.  
8 So let me ask you: Towards the end of January, did there come  
9 a time where you sent me an email regarding Acis's quarterly  
10 operating reports?

11 A Yes.

12 Q Okay. And you copied Mr. Hurst on that email as well,  
13 correct?

14 A Correct.

15 Q Okay. And your email was to say, hey, can we set up a  
16 time to talk because I've got -- Highland's got some questions  
17 about the quarterly operating report. Do you recall that?

18 A Yes.

19 Q Okay. And again, just so we're clear, this is around end  
20 of January 2020, right, after the appointment of the Board?

21 A Yes. You --

22 Q Okay.

23 A I think there's an exhibit. One of your exhibits is that.

24 Q There is. If you turn to --

25 A Or it's a portion of that email communication.

O'Neil - Cross

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1 Q It is. It's -- if you turn to Tab 28, this is sort of  
2 your initial email to me, correct?

3 A Yeah. This is not the entire email dialogue, because --

4 Q There were other emails afterward.

5 A -- I did not get a response and sent a couple of emails  
6 later, several days later, asking for a response.

7 Q Right. And I actually did respond to you after that,  
8 correct?

9 A Approximately a week later, yeah.

10 Q Okay. Because I was out sick, actually.

11 A Yeah. That's what you said.

12 Q Right. So, --

13 A You didn't say sick, but you were out, so it's okay.

14 Q Yeah. I was out. And so -- and I will tell you, I was  
15 sick. So I responded, albeit a little bit late, but I did  
16 respond to you and say, Ms. O'Neil, could you tell me what  
17 your questions are so that I can be prepared?

18 Does that sound about right?

19 A Yeah.

20 Q Okay.

21 A Yes.

22 Q And I never -- I never got a response to that. You never  
23 told me what your questions were with respect to the quarterly  
24 operating report, right?

25 A Yes. And I --



O'Neil - Cross

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1 Q Okay.

2 A I can explain that. Because Mr. -- I believe Mr.

3 Pomerantz said that there was a meeting that was -- and they  
4 would discuss it then, so --

5 Q Okay.

6 A Or Mr. Demo. I'm sorry. Somebody from Pachulski told me  
7 that that would be addressed. Also, the status conference --  
8 I mean, the questions we had were because there was a February  
9 3rd status conference coming, and I wanted to see if we could  
10 get some clarity so that when we appeared before the status  
11 conference we could limit what we were going to be discussing  
12 with the Court, if anything.

13 Q Okay. Well, what were -- what were the nature of your  
14 questions? Because there was a conversation between Mr. Terry  
15 and myself and the Board and -- well, certain members of the  
16 Board. But what were your questions pertaining to?

17 A Oh, okay. Happy to discuss that. It's kind of awkward to  
18 have it in -- on this, in this --

19 Q On Q and A.

20 A -- forum, but --

21 Q I hear you.

22 A We sent -- as the Court will recall, the confirmation  
23 injunction can be lifted if all the claims are paid. So,  
24 since the plan, the Acis plan was confirmed, we have been  
25 tracking -- and the only way to track it is through the QORs

O'Neil - Cross

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1 -- what the revenues were coming in and what has been paid.  
2 And so -- in terms of expenses and then claims. And so we  
3 have been -- my paralegal has been tracking this.

4 As the Court may know from looking at the record, almost  
5 all of -- any other claims that were in the case were either  
6 disallowed or withdrawn. And so, really, the only claim,  
7 other than Highland's, was Mr. Terry's that was really left to  
8 be paid, other than administrative claims. And I believe the  
9 administrative claimants had agreed to deferral on some of  
10 their payments after the effective date.

11 So we had been tracking the payments, which you can track  
12 through the QORs, and it appeared that all of -- including Oak  
13 Tree's most recently allowed administrative claim -- that all  
14 of the administrative claims had been paid, and it appeared at  
15 least approximately a half of Mr. Terry's claim had been paid.

16 When you look at the QORs, it doesn't specifically say,  
17 "Here's who got what payment," but it shows the claims being  
18 paid down, in addition to just general expenses of the post-  
19 confirmation Debtor. And I'm -- this is taking a little bit,  
20 but in the disclosure statement to the plan, there had also  
21 been plan projections that set forth the revenues that were  
22 anticipated post-confirmation to pay the claims. And so  
23 likewise -- as well as the expenses, including to Brigade or  
24 just general operating expenses for Acis.

25 So, likewise, through the QORs, we had been comparing

O'Neil - Cross

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1 those against what was in the plan projection. And there were  
2 some things that weren't matching and we simply were having  
3 questions about the expenses seemed to be much higher.  
4 However, the claims were being paid down, so it looked like  
5 Mr. Terry was the only claimant left and was probably owed, by  
6 our calculation, around \$4-1/2 million, and that was the only  
7 thing left to be paid. And, but the revenues per the QOR was  
8 showing cash available of over five and -- \$5.3 million.

9 So, one of the things we wanted to discuss was the  
10 application of using the cash to go ahead and pay down what  
11 was left of Mr. Terry's claim so that the injunction could be  
12 lifted. But wanted to discuss that with you. That was the  
13 purpose of that.

14 Q Okay. And I guess let me back up. One, let me kind of  
15 correct you on a technical point, which is Mr. Terry's claim  
16 isn't the only claim that's left outstanding. There were also  
17 law firm claims that were lodged as against Acis, correct?

18 A I believe there were two --

19 MR. MORRIS: Objection, Your Honor. Just relevance.  
20 I don't get it.

21 THE COURT: Okay. Sustained. You've gone seven  
22 minutes. So, three more minutes and we need to wrap it up.

23 MS. PATEL: Okay.

24 BY MS. PATEL:

25 Q Well, I guess, Ms. O'Neil, kind of in line with the email,

O'Neil - Cross

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1 the email came in shortly before Acis was sued by your co-  
2 counsel, Lynn Pinker, on behalf of the Charitable DAF and CLO  
3 HoldCo. Are you aware of this lawsuit?

4 A After it was filed. I was not aware of it before it was  
5 filed. The second one. I had seen the first one after it was  
6 filed. I had not seen the second one until after it was  
7 filed. We have a conflict with one of the defendants in that,  
8 so --

9 Q Okay. So, and when you say "the first one," are you  
10 talking about when it was originally the Charitable DAF versus  
11 U.S. Bank National Association and Moody's Investors Service?

12 A Yes.

13 Q Okay. And that all involved claims by the DAF brought  
14 against U.S. Bank and Moody's at the time relating to the Acis  
15 bankruptcy, right? It's claims that U.S. Bank didn't manage  
16 --

17 A Ms. --

18 Q -- as a trustee correctly, correct?

19 A Ms. --

20 MR. MORRIS: Objection, Your Honor. She's got no  
21 foundation. She said she has a conflict and wasn't involved  
22 with this case.

23 THE COURT: Sustained.

24 THE WITNESS: That's correct.

25 BY MS. PATEL:

O'Neil - Cross

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1 Q Okay. I guess, Ms. O'Neil, let me just ask you: Did you  
2 have any involvement with -- if you look at Tab 27, that's a  
3 copy of the lawsuit, so that we're all clear exactly which one  
4 I'm asking you about. This is the lawsuit between the  
5 Charitable DAF and CLO HoldCo, your former client, versus U.S.  
6 Bank National Association, Moody's Investors Service, Acis  
7 Capital Management, Brigade, and Josh Terry. Did Foley have  
8 any involvement in the drafting or formulation of this  
9 lawsuit?

10 A None.

11 Q Okay.

12 MS. PATEL: No further questions, Your Honor.

13 THE COURT: All right. Any redirect?

14 MR. MORRIS: Very briefly.

15 THE COURT: Okay.

16 REDIRECT EXAMINATION

17 BY MR. MORRIS:

18 Q Ms. O'Neil, you've been representing a number of different  
19 entities associated with Highland since 2018, right?

20 A Correct.

21 Q And are those entities identified in Plaintiff's Exhibit  
22 #2 in the engagement letter?

23 A Plaintiff's 2 or -- sorry.

24 Q The Debtor's.

25 A The Debtor's 2. Okay. Let me switch. They are.

O'Neil - Redirect

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1 Q Okay. And since the Board has been appointed, have you  
2 met with board members to discuss the status of the matters  
3 that your firm has been handling?

4 A Yes.

5 Q And without disclosing attorney-client communications, did  
6 that involve providing a history of the work that you'd done?

7 A Yes.

8 Q Did that involve providing a history of the work that you  
9 expected to do in the future?

10 A Yes.

11 Q Did the Board have an opportunity to ask questions of you?

12 A Yes.

13 Q And did you, in fact, answer the Board's questions?

14 A I endeavored to do so to the best of my ability, yes.

15 Q Okay.

16 A Or I followed up if -- with information via email if I  
17 needed to get additional information.

18 Q And is it your understanding that the Board supports your  
19 retention for the purposes that were described earlier by Mr.  
20 Nelms?

21 A Yes.

22 Q Okay.

23 MR. MORRIS: I have nothing further, Your Honor.

24 THE COURT: Any recross on that redirect?

25 MS. PATEL: No, Your Honor.

O'Neil - Redirect

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1 THE COURT: All right. Ms. O'Neil, you're excused.

2 THE WITNESS: Thank you.

3 (The witness steps down.)

4 THE COURT: All right. Highland, any more evidence?

5 MR. MORRIS: No, Your Honor. We rest.

6 THE COURT: All right. Is there any evidence from  
7 Acis?

8 MR. LAMBERSON: No, ma'am.

9 THE COURT: All right. Let's take a five-minute --  
10 please, five-minute break -- and then we'll hear your closing  
11 arguments.

12 THE CLERK: All rise.

13 (A recess ensued from 12:47 p.m. until 12:56 p.m.)

14 THE CLERK: All rise.

15 THE COURT: All right. Please be seated. We're  
16 going back on the record in Highland. I'll hear closing  
17 arguments.

18 I'm going to ask a question. I need clarification --

19 MR. DEMO: Of course.

20 THE COURT: -- on this. First off, in the Acis  
21 adversary that's stayed in the Acis bankruptcy case, Foley,  
22 it's proposed, would represent Highland. But is Foley also  
23 representing co-defendants in that adversary? You know, I  
24 think King & Spalding is representing all the co-defendants,  
25 or someone else is, but am I wrong or right about that?

1 MR. DEMO: Yes and no, Your Honor. I think there's  
2 been some miscommunication on that. The adversary, as we  
3 understand it, is stayed, and because of that we are not  
4 seeking to represent -- or retain Foley in that adversary,  
5 although we will if that comes up again. So, in the  
6 adversary, pre-petition, Foley did represent the Debtor and  
7 then a handful of other creditors who were brought into that  
8 adversary, as we understand it, as defendants. On a go-  
9 forward basis, though, we are proposing to retain Foley on  
10 three things: General matters in the bankruptcy proceeding;  
11 the appellate --

12 THE COURT: General matters in the Acis bankruptcy  
13 proceeding?

14 MR. DEMO: Correct, Your Honor. The appeal involving  
15 the confirmation order. And the appeal involving the Neutra  
16 litigation. And --

17 THE COURT: Okay. On the appeal of the involuntary,  
18 --

19 MR. DEMO: Yes, ma'am.

20 THE COURT: -- only Neutra --

21 MR. DEMO: That is correct.

22 THE COURT: -- is an appellant. Okay. So what  
23 you're asking is for authority for Highland to pay the legal  
24 fees of Neutra on that?

25 MR. DEMO: Yes, Your Honor.



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1 THE COURT: Okay.

2 MR. DEMO: We are. And we, again, to the --

3 THE COURT: And let me -- let me -- and then the  
4 appeal of the confirmation order, are the appellants Highland  
5 and Neutra only, or is HCLOF an appellant?

6 MR. DEMO: In terms of Foley's representation, it's -  
7 -

8 THE COURT: No, no, no. Just answer the question.  
9 Who are the appellants in the confirmation order?

10 MR. DEMO: Highland, Neutra, and HCLOF.

11 THE COURT: Okay. Who is representing HCLOF?

12 MR. DEMO: King & Spalding.

13 THE COURT: Okay. And Foley has thus far been  
14 representing Neutra and Highland?

15 MR. DEMO: Correct, Your Honor.

16 THE COURT: Okay. Well, okay. You may proceed.

17 MR. DEMO: And I will be brief. And I think  
18 ultimately this, this is a relatively simple thing, and I  
19 think you've nailed it.

20 What are the benefits to the estate of -- because nobody  
21 has objected, again, to Foley representing the Debtor. What  
22 are the benefits to the estate for Foley representing Neutra  
23 and being paid for that by the Debtor? And to answer that  
24 question, I think you have to look to all the testimony that  
25 we've heard today, and you also have to look at who's

1 objecting, Your Honor. The Committee is not objecting. There  
2 is no other committee member objecting besides Acis. The only  
3 party objecting to Neutra -- or, I'm sorry, to Highland paying  
4 Neutra's fees in the appeal, which, again, are a portion of  
5 the \$500,000 that we think is going to be incurred post-  
6 petition on this, excluding today, because today has obviously  
7 gone a little bit long -- the only party objecting to paying a  
8 portion of that \$500,000 to have Foley represent Neutra in an  
9 appeal that is happening less than six weeks from now is Acis.

10 Acis is the party opponent in that. Acis is the party  
11 that stands to benefit, not just because the involuntary  
12 petition will not be overturned, but because there will be a  
13 lack of leverage and a lack of ability to contest their \$75  
14 million, which is where it started, but it keeps growing.  
15 It's at \$300 million now. The only party who's objected to  
16 that is Acis. None of the other creditors have objected.

17 THE COURT: Well, until the past 24 hours, the  
18 Committee was objecting.

19 MR. DEMO: Correct, Your Honor. And we had a --  
20 finally had a chance, with the new Board in place, to discuss  
21 it with the Committee. And the new Board explained to the  
22 Committee that, in their business judgment, spending this  
23 money, this \$500,000 -- which, again, is going to be allocated  
24 across these three matters; not all of it's going to be  
25 allocated to Neutra; a portion of it is going to be allocated

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1 to Neutra -- \$500,000 for the possibility of a recovery to the  
2 estate, the possibility of the ability to challenge a \$300  
3 million proof of claim that impacts not just the estate but  
4 the other creditors in the estate, substantially, because  
5 there's only so much money here. So, --

6 THE COURT: Okay. Let me ask you to recap what the  
7 evidence was on benefit to Highland --

8 MR. DEMO: On benefit --

9 THE COURT: -- from the overturning of the order for  
10 relief in Acis.

11 MR. DEMO: In terms of the overturning of the order  
12 for relief in Acis, there were -- there was testimony on the  
13 possibility -- and again, it's a possibility, and we're not  
14 disputing that. Acis's attorneys said it was 10 percent.  
15 That's fine. Maybe it's 10 percent. There was evidence  
16 presented by Mr. Nelms on the possibility that if the Acis  
17 involuntary is overturned, that the contracts at issue, the  
18 advisory and the sub-management agreements, --

19 THE COURT: Well, let's take it sequentially, because  
20 you've got to, you know, look at benefit of the estate --

21 MR. DEMO: Understood.

22 THE COURT: -- versus time and cost, to some degree,  
23 right?

24 MR. DEMO: Right.

25 THE COURT: So, Neutra wins.

1 MR. DEMO: Okay.

2 THE COURT: Okay? That means, according to Mr.  
3 Lamberson's argument, which I think is the correct argument,  
4 that we send to arbitration whether it's appropriate for Acis  
5 to be in a bankruptcy.

6 MR. DEMO: Correct, Your Honor.

7 THE COURT: Okay.

8 MR. DEMO: Well, may be correct.

9 THE COURT: So, --

10 MR. DEMO: I think we did hear there's a different  
11 possibility from Mr. Nelms.

12 THE COURT: Well, what is the other possibility?

13 MR. DEMO: Well, okay. Understood, Your Honor.  
14 Okay.

15 THE COURT: Okay.

16 MR. DEMO: So, say we -- assuming we send it to  
17 arbitration, --

18 THE COURT: So that means an arbitration panel is  
19 convened, and at some point, many months from now, an  
20 arbitration panel will either say yes or no, involuntary, you  
21 know, should have gone forward.

22 MR. DEMO: Okay.

23 THE COURT: Okay? Let's say the arbitration panel  
24 says no, should not have gone forward. Then what does the  
25 world look like for Highland?

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1 MR. DEMO: I guess, taking it a step back, Your  
2 Honor, assuming that this does go to arbitration, it also  
3 means that the involuntary petition was not entered. If the  
4 involuntary petition was not entered, which means that the  
5 Acis equity did not go to Mr. Terry, it stayed under Neutra,  
6 at that point --

7 THE COURT: Wait, wait, wait.

8 MR. DEMO: -- you also go into arbitration.

9 THE COURT: Wait, wait. Wait, wait. So you're  
10 saying that everything is wiped out in the involuntary, the  
11 Acis bankruptcy case?

12 MR. DEMO: Your Honor, and I do want to be really,  
13 honestly, very, very clear about this. I am -- I am not  
14 saying anything. I'm not -- trying very hard not to draw a  
15 legal conclusion. What I'm saying is that the Board has  
16 analyzed this, the Board has applied business --

17 THE COURT: But I'm trying to understand --

18 MR. DEMO: -- judgment to this, and that there is a -  
19 - there is a possibility. Now, --

20 THE COURT: I'm trying --

21 MR. DEMO: -- obviously, reasonable minds can --

22 THE COURT: Okay. Here's where I'm coming from. And  
23 you can tell me if I'm analyzing this incorrectly, in your  
24 view. Okay. We used to have this terrible Fifth Circuit case  
25 -- you know, God help me if this transcript gets sent -- but

1 called *Pro-Snax*. Okay?

2 MR. DEMO: Okay.

3 THE COURT: I think the Fifth Circuit has decided  
4 itself that it was terrible, so it's not going to come back to  
5 haunt me, saying that. So, *Pro-Snax* said basically the  
6 Bankruptcy Court is a Monday-morning quarterback in looking at  
7 the reasonableness of fees. You know, did it provide a  
8 benefit to the estate?

9 MR. DEMO: Uh-huh.

10 THE COURT: And then that got reversed a few years  
11 ago. I think it was the *Woerner* case -- *Baron & Newburger*  
12 (*Woerner*) -- where the Court said, no, you don't do a  
13 hindsight look. You look at, at the time fees were expensed,  
14 --

15 MR. DEMO: Uh-huh.

16 THE COURT: -- was there something like a reasonable  
17 possibility they would benefit the estate?

18 MR. DEMO: Yes.

19 THE COURT: Okay? So I'm looking through it in that  
20 lens, so to speak, and I'm like, what benefit to the Highland  
21 estate could there be if the confirmation -- well, if the  
22 order for relief is unwound or the confirmation order is  
23 unwound? And I'm not there. I'm not there understanding any  
24 benefit for Highland.

25 I can understand a benefit, maybe, for *Neutra*, although I

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1 am even hard-pressed to see that, because it looks like years  
2 of more litigation.

3 MR. DEMO: And Your Honor, I mean, I do think that  
4 there was -- and again, I'm not going to challenge your legal  
5 conclusions -- I do think that there was evidence that in the  
6 Board's business judgment they did analyze this and they see  
7 it, I think, a little bit differently.

8 THE COURT: And I should defer heavily to a Board's  
9 reasonable exercise of business judgment. I've got trouble.  
10 So I'm just trying to --

11 MR. DEMO: Understood. And I think, when you look at  
12 that business judgment, --

13 THE COURT: Uh-huh.

14 MR. DEMO: -- you know, obviously, I don't disagree.  
15 I do think that when you have a three-person independent board  
16 of this caliber who's come into a difficult situation, has  
17 reviewed all of the evidence, talked to all the applicable  
18 people, when things happened with the DAF litigation that they  
19 didn't like, they took action to stop that. When they looked  
20 at the Winstead appeal and they said, you know, there's not a  
21 benefit to the estate here, let's drop they, they dropped it.

22 THE COURT: But again, work with --

23 MR. DEMO: When they --

24 THE COURT: Work with me. Fifth Circuit reverses the  
25 order for relief. I don't think you have disagreed with

1 Lamberson's argument that best-case scenario in that reversal  
2 scenario is that an arbitration panel now looks at, should  
3 this Acis -- you know, should it have gone forward in a  
4 bankruptcy?

5 MR. DEMO: Well, I guess, Your Honor, then maybe I --

6 THE COURT: So, in that many --

7 MR. DEMO: -- I'm not being clear.

8 THE COURT: -- months, let's say eight months that an  
9 arbitration panel takes to decide, what happens during that  
10 eight months?

11 MR. DEMO: Well, then I guess, Your Honor, I need to  
12 step back, because I have not -- absolutely not been clear.  
13 If it goes to an arbitration panel, our view -- and I think  
14 Ms. O'Neil's briefs to the Fifth Circuit are clear on this --  
15 the arbitration panel is going to arbitrate whether  
16 or not there was a fraudulent conveyance. It's going to  
17 arbitrate how to resolve the claims. It's not going to  
18 arbitrate whether or not the involuntary petition should ever  
19 have been entered.

20 THE COURT: Wait, wait. What does that mean? Of  
21 course. That's the starting point of it all, right? The  
22 appeal is the Bankruptcy Court wrongly held a trial on the  
23 involuntary petition and ordered for relief. It should have  
24 deferred to an arbitration panel to do that. Isn't that  
25 appeal number one that we're talking about?



1 MR. DEMO: Yes, but --

2 THE COURT: Neutra's appeal?

3 MR. DEMO: Yes, it is.

4 THE COURT: Okay.

5 MR. DEMO: But I do think there's a nuance. And I do  
6 want to defer to the pleadings that were filed with the Fifth  
7 Circuit, because I don't want here to get myself out in front  
8 of that Fifth Circuit appeal, because obviously I do very much  
9 want that appeal to go forward. And maybe we lose and maybe  
10 we win, but if we win, I think the --

11 THE COURT: If Neutra wins.

12 MR. DEMO: If Neutra wins, one of the outcomes -- and  
13 again, I understand that, you know, reasonable minds can  
14 differ that there --

15 THE COURT: Okay.

16 MR. DEMO: -- of the outcomes.

17 THE COURT: But one of the outcomes.

18 MR. DEMO: One of the outcomes is that the  
19 involuntary petition is unwound, withdrawn, and the parties go  
20 to arbitration on the claims. If that were to happen, --

21 THE COURT: Wait. It's unwound and they go to  
22 arbitration on what claims? The claims in the adversary  
23 proceeding that's been filed in Acis?

24 MR. DEMO: Again, Your Honor, I'm not the appellate  
25 lawyer here. I mean, this is why we are here.

1 THE COURT: But how do you skip over the arbitration  
2 of the order for relief? Because if Joshua Terry, who  
3 commenced it, you know, he has the right now to argue to an  
4 arbitration panel that this should have been in bankruptcy,  
5 right? He doesn't have to just agree that the adversary  
6 proceeding is now arbitrated. Right?

7 MR. DEMO: Well, again, Your Honor, I don't want to  
8 substitute my judgment for the judgment of the Board. I think  
9 the judgment of the Board is that there is a scenario and that  
10 it's worth exploring and that it's worth the -- what we  
11 honestly think is a limited amount of money to explore.  
12 Because I think, if we explore that, we explore the  
13 possibility, quite honestly, of taking it out of bankruptcy,  
14 then, yes, in that scenario, and which we do it think is  
15 possible, in that scenario, and call it whatever probability  
16 you want, but if you're going to spend half a million dollars  
17 to get to a scenario that could reap you -- and I don't want  
18 to put a number on it -- but millions of dollars in future  
19 revenue, millions of dollars in terms of --

20 THE COURT: You're melding. You're collapsing. And  
21 we all know as lawyers that's not how it works. Things happen  
22 sequentially, okay?

23 MR. DEMO: Okay. Then I guess, going --

24 THE COURT: There's a setting aside -- well, there's  
25 a reversal of the Bankruptcy Court's issuance of an order for

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1 relief.

2 MR. DEMO: Okay.

3 THE COURT: And that means you should have deferred  
4 to an arbitration panel, Judge Jernigan. And so they remand  
5 so that I can, consistent with that appellate ruling, say,  
6 We're staying the bankruptcy and it's going to arbitration to  
7 decide whether an order for relief. Is there really any  
8 realistic scenario where we skip that step?

9 MR. DEMO: We think that there's a scenario that is  
10 worth exploring.

11 THE COURT: I feel like your colleagues are really  
12 dying to chime in because they think they've got the answer to  
13 my question, no offense to you.

14 MR. MORRIS: I really -- I don't, Your Honor, but if  
15 I may.

16 THE COURT: Uh-huh.

17 MR. MORRIS: I think Ms. O'Neil is the appellate  
18 lawyer. Maybe she should speak on this very precise point, --

19 THE COURT: Okay. Because --

20 MR. MORRIS: -- if that's okay with the Court.

21 THE COURT: Because I see many miles --

22 MR. MORRIS: Yeah.

23 THE COURT: -- to go before we sleep if there's a  
24 reversal, and I'm trying to figure -- well, you know, we all  
25 know that, right?

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1 MS. O'NEIL: Your Honor, if I may.

2 THE COURT: Uh-huh.

3 MS. O'NEIL: And I did not want to interrupt Mr.  
4 Demo, and he's done a great job, but obviously we've been  
5 involved with the appeal.

6 THE COURT: Right.

7 MS. O'NEIL: We've prepared the briefs.

8 THE COURT: So how does it play out if there's a  
9 reversal in favor of Neutra --

10 MS. O'NEIL: If I may, Your Honor.

11 THE COURT: -- of the order for relief?

12 MS. O'NEIL: The issue on the appeal is not to send  
13 the concept to arbitration of the involuntary petitions.

14 THE COURT: Okay.

15 MS. O'NEIL: It is that Mr. Terry was not a qualified  
16 petitioner because he was bound by an arbitration, a binding  
17 arbitration agreement, and that the issue that he -- by  
18 proceeding with these involuntary petitions, he commenced a  
19 suit, a proceeding that was, at its core, about fraudulent  
20 transfers, and that that should have gone to arbitration. And  
21 to proceed and try to engage this Court's jurisdiction on  
22 something that he had contractually agreed to go to  
23 arbitration on was improper.

24 So, if Neutra wins on that argument, and I would encourage  
25 the Court, we -- I think the briefs are in one of the

1 exhibits, but certainly I would provide them to the Court  
2 before the Court makes a determination if it would help. If  
3 there -- if Neutra wins on that appeal, then our position  
4 would be that yes, the bankruptcy is effectively void *ab*  
5 *initio*, and that's what we believe the case law supports.

6 Where that would put the parties, potentially -- and  
7 again, we're speculating what the Fifth Circuit may or may not  
8 due to instruct this Court to do -- could reverse and render,  
9 as it were, as Mr. Nelms testified happened to him previously,  
10 but could instruct this Court to abstain, which I think was --  
11 and that is one of the various motions and the orders that the  
12 Court had denied. All of these are wrapped up in the appeal,  
13 Your Honor. And in doing so, instruct the petitioner, Mr.  
14 Terry, and Acis to go arbitrate the issue of the fraudulent  
15 transfers. That would reinstate Acis. Acis could reinstate  
16 Highland as the manager of the CLOs.

17 THE COURT: So every single order in the Acis case  
18 would be null and void?

19 MS. O'NEIL: We believe that the case law is that it  
20 would be void *ab initio*. And now, Your Honor, practically  
21 speaking, --

22 THE COURT: Void *ab initio*? Okay. That could only  
23 -- is that hinged to a subject matter jurisdiction, lack of  
24 subject matter jurisdiction --

25 MS. O'NEIL: Partially, that's part of the argument.

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1 THE COURT: -- theory?

2 MS. O'NEIL: That's part of the argument. Yes, Your  
3 Honor.

4 THE COURT: Okay.

5 MS. O'NEIL: Practically speaking, it is our belief,  
6 although it is not clear, is what I've tried to kind of convey  
7 to the Court, and in conjunction with this conversation I was  
8 trying to have with Mr. Terry's counsel/Acis's counsel, is  
9 that we believe Mr. Terry has been paid down. Practically  
10 speaking, if that happens and he's only left with a claim or  
11 currently has a claim of \$4 million, \$4-1/2 million, which is  
12 what we think it is, or it's somewhere in that neighborhood,  
13 that -- and there's sufficient cash in Acis to pay that claim  
14 off -- it is a claim Judge -- Mr. Nelms testified to the fact  
15 that it would need to be paid -- then there may not even need  
16 to be a fraudulent transfer lawsuit because the claim would --  
17 what's left of the claim would just be paid off. And then  
18 Acis -- Neutra would be back in ownership of Acis, Acis would  
19 engage Highland to come back in and do what it was doing  
20 before, Mr. Terry got his claim paid off, and there we are.

21 THE COURT: Okay.

22 MR. DEMO: That's honestly pretty much it, Your  
23 Honor. And we think that -- and the Board thinks that the  
24 benefit of pursuing that is worth it, quite honestly. And  
25 they think, in their business judgment, that it's worth paying

1 those Neutra fees -- which again, are a portion of the  
2 \$500,000, only a portion -- because that benefit accrues to  
3 the estate, or could accrue to the estate in a situation  
4 where, in their business judgment, it's worth going forward on  
5 this.

6 THE COURT: Okay. The appeal -- okay. Let me make  
7 sure I heard this correctly. The appeal of the confirmation  
8 order, whereas we have Neutra only on the appeal --

9 MR. DEMO: Correct.

10 THE COURT: -- of the order for relief, the appeal of  
11 the confirmation order is Highland, Neutra, and HCLOF.

12 MR. DEMO: Correct.

13 THE COURT: And King & Spalding still represents  
14 HCLOF in connection with that appeal.

15 MR. DEMO: Correct. And they're the only law firm  
16 representing HCLOF in that appeal.

17 THE COURT: So here's what I'm struggling with. You  
18 know, what initially seemed like kind of a compelling argument  
19 -- all the briefing has been done, oral argument is set in  
20 March -- it feels like to me the main beneficiaries of a  
21 reversal of that confirmation order are HCLOF and Neutra.  
22 Foley can represent Neutra. Neutra can pay. King & Spalding  
23 can represent HCLOF. HCLOF can pay. And that seems like the  
24 reasonable scenario to me.

25 MR. DEMO: And I hear that. But I think -- and I

1 think Mr. Nelms --

2 THE COURT: Because let's --

3 MR. DEMO: -- testified to it, but --

4 THE COURT: Work with me. Let's say they don't

5 reverse the order for relief --

6 MR. DEMO: Okay.

7 THE COURT: -- but they do reverse the confirmation  
8 order.

9 MR. DEMO: Okay.

10 THE COURT: So, Chapter 11 Trustee is in place  
11 representing Highland, and he can -- I'm sorry -- he is the  
12 spokesperson for the Acis, the controller of the Acis estate.  
13 He might go forward with plan number four, five, whatever it  
14 would be.

15 MR. DEMO: Okay.

16 THE COURT: Or say, I think it's time to convert this  
17 to 7. I mean I'm just trying to figure out --

18 MR. DEMO: And I guess I do want to go back to one  
19 thing, --

20 THE COURT: Uh-huh.

21 MR. DEMO: -- because I do not think there is another  
22 economic beneficiary that would pay Neutra's fees. I think if  
23 the Debtor is not allowed to pay Neutra's fees, nobody will  
24 pay Neutra's fees, and that portion of the appellate argument  
25 will fall by the wayside. Because --



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1 THE COURT: So Neutra loses, but I don't see how  
2 Highland loses. You have not painted a scenario where it's  
3 clear to me there's any economic benefit to the estate.

4 MR. DEMO: I would, I would, with all --

5 THE COURT: And you're telling me, Defer to the  
6 Board's business judgment. But I'm --

7 MR. DEMO: Well, I --

8 THE COURT: I'm concerned that the evidence hasn't  
9 shown me --

10 MR. DEMO: I would also ask, Your Honor, --

11 THE COURT: -- all of the --

12 MR. DEMO: -- in all --

13 THE COURT: -- scenarios that lead to their  
14 reasonable business judgment on this.

15 MR. DEMO: As Ms. O'Neil just said, I mean, this is  
16 above the Fifth -- to the Fifth Circuit. The Fifth Circuit is  
17 set to hear this in six weeks. And if the Fifth Circuit rules  
18 the way that Ms. O'Neil just said, I do think, and I think the  
19 Board thinks -- actually, I know the Board thinks -- that  
20 there is a tangible benefit to the estate here. And so I know  
21 that I'm asking you to defer to their judgment, --

22 THE COURT: All I heard was --

23 MR. DEMO: -- but I'm also asking just for --

24 THE COURT: -- that they'd reinstate the sub-advisory  
25 and shared services agreements.

1 MR. DEMO: Which are --

2 THE COURT: Which, by the way, Highland moved to  
3 terminate, moved to compel rejection at one point during the  
4 case, and then, when that didn't work, HCLOF started calling  
5 for redemption.

6 MR. DEMO: And it's not the --

7 THE COURT: This is nuts for me --

8 MR. DEMO: It's not -- it's not the -- Your Honor,  
9 it's --

10 THE COURT: Tell me why it's not nuts for me to think  
11 --

12 MR. DEMO: Because it's not the same Highland.

13 THE COURT: -- that Highland would be thrilled to  
14 have Acis back managing the CLOs and subcontracting with  
15 Highland. I mean, that --

16 MR. DEMO: It's not, it's not the same Highland. The  
17 stuff that happened prior to the institution of the Board was  
18 the stuff that happened prior to the institution of the Board.  
19 There is new management of Highland. That new management is  
20 working very hard. As you've seen, Your Honor, that new  
21 management is willing to push back. That new management, with  
22 the DAF, which you've heard testimony of, that new management  
23 is working to get that motion withdrawn. That new management  
24 is not going forward with Lynn Pinker because of actions that  
25 it took that it thought subverted their control and their

1 management of the Debtor. The new management decided to drop  
2 an appeal that they did not think had any merit.

3 It's not the same Debtor, Your Honor. It is a board  
4 consisting of three highly-qualified people who are exercising  
5 their own judgment. So all of that stuff that happened prior  
6 to January 9th, I don't want to say hey, it's a clear line in  
7 the sand, but it is. Mr. Dondero is not in control of  
8 Highland Capital Management.

9 THE COURT: But he is in control of Neutra.

10 MR. DEMO: He is the economic beneficiary of Neutra.  
11 That is correct. But Mr. Dondero did tell Mr. Nelms, as Mr.  
12 Nelms testified, that he would reinstate those contracts. And  
13 I understand that. But again, as you've seen, Mr. Nelms and  
14 the Board have been able to push back, have been able to exert  
15 control, to exert influence, and to exert management over an  
16 institution that is very difficult to manage.

17 And I do think that deference to that is something that  
18 should very much be considered, because it's very easy to  
19 think of this as Old Highland, but this is New Highland, who  
20 has done an independent, objective review of these claims, who  
21 has sat with Ms. O'Neil, who has sat with Pachulski, who has  
22 sat with Mr. Terry and Ms. Patel and talked about this stuff,  
23 and still thinks that there is a benefit here to the estate,  
24 and that spending the \$500,000 to pursue that benefit, which  
25 is not just a benefit to Highland but it's a benefit to

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1 Highland other -- to Highland's other creditors, I guess, Your  
2 Honor, quite honestly, I would ask that you to defer to that  
3 new management, because it is not -- it is not Old Highland.

4 All that stuff that people have talked about -- I mean,  
5 you've seen today in court, you've heard testimony about very  
6 qualified people working to stop that and working to put this  
7 estate into a position where it can reorganize, where it can  
8 come to agreements with its creditors, where it can work  
9 through this process, where it can come out the other side.

10 But if we take away that Board's ability to manage  
11 litigation with one of their biggest creditors, whose  
12 litigation claim keeps growing, all you're doing is  
13 benefitting that one creditor, not to the detriment of Mr.  
14 Dondero but to the detriment of the other creditors in this  
15 case.

16 UBS has a claim. Redeemer has a claim. Meta-e has a  
17 claim. McKool's has a claim. You can run through that whole  
18 list. And if you take away the Board's right to direct  
19 litigation that is going directly to the Board's ability to  
20 control runaway claims, to negotiate with creditors, and to  
21 come up with an idea of how to split the pie, then, with all  
22 respect, Your Honor, you are infringing on that Board's  
23 business judgment and that Board's ability to reorganize this  
24 case.

25 This case isn't just about --

1 THE COURT: It wouldn't be taking away. And here is  
2 a nuance that -- I think it is perfectly reasonable, in case  
3 you don't know where I'm heading on this, for Foley to  
4 represent Highland in the Acis case, in that adversary  
5 proceeding, if it goes forward, because heck yeah, Highland  
6 has been sued for huge amounts of money.

7 MR. DEMO: Understood.

8 THE COURT: Their claim, that is many millions, has  
9 been objected to. So, heck yeah, this estate needs good  
10 representation of Highland in that case, where there are many  
11 unresolved issues still in the Acis case.

12 But on the appeal, I am just still lost as to how there is  
13 any chance in the world Highland benefits in those appeals.  
14 Neutra, heck yeah. Maybe they get their Acis back and can  
15 instruct it to, you know, stop suing Highland or whatever.  
16 Dondero controlling Neutra can do that. Okay? And HCLOF, it  
17 doesn't want Acis to have anything to do anymore with managing  
18 its equity piece of those CLOs. Sure. But how -- I mean,  
19 you're telling me that there could be a scenario -- here's  
20 what I'm hearing. That there is a benefit in having all those  
21 fraudulent transfer claims arbitrated, I guess, not litigated  
22 in the Bankruptcy or District Court, and there's a benefit in  
23 having all of the management agreements, portfolio management  
24 agreements reinstated. And I just, I don't see how that  
25 happens anytime soon based on how I perceive a reversal of

1 orders on appeal happening.

2 MR. DEMO: And I guess I don't know what else to say  
3 on that point. We do think there's a \$12 million tangible  
4 benefit to reinstating those contracts. We think there's a  
5 tangible benefit to allowing Neutra to go forward with its  
6 appeal. And again, there is nobody else who I think would pay  
7 that freight besides the Debtor, because that benefit, we  
8 believe, goes to the Debtor.

9 THE COURT: How many years of life are there left on  
10 the CLOs that Acis manages?

11 MR. DEMO: I would have to check, Your Honor. I  
12 don't know off the top of my head. I can ask. But --

13 THE COURT: I mean, you're saying \$12 million. I  
14 mean, I don't --

15 MR. DEMO: I, you know, --

16 THE COURT: There's not a -- I'm just not sure where  
17 that number is coming from. I never heard direct evidence of  
18 that.

19 MR. DEMO: Okay. Well, I guess, Your Honor, I mean,  
20 again, I would just ask that you defer to the business  
21 judgment of the Board and allow them to position this  
22 litigation in a way that best enables them to deal with every  
23 creditor's claim, and not just the claims of one creditor.  
24 And if they cannot fight the claims of the creditor, then they  
25 can't negotiate how that pot is going to be split in a fashion

1 that benefits everybody.

2 So I guess, Your Honor, I mean, I don't know what else to  
3 say about the benefits of the Neutra appeal except that the  
4 testimony, I think, speaks for itself. But, you know, I --  
5 and in terms of --

6 THE COURT: Again, fight the claim of a creditor.  
7 Foley can represent Highland in the adversary proceeding,  
8 wherever that goes forward.

9 MR. DEMO: Yeah.

10 THE COURT: Probably District Court, not this Court.  
11 At least some of it, if not all of it. But anyway, I'm  
12 digressing. They can object to Acis's proof of claim. They  
13 can object to Terry's proof of claim. I mean, --

14 MR. DEMO: And conversely, Your Honor, if -- if --

15 THE COURT: -- this has nothing to do with -- I mean,  
16 I don't get the appeal. I mean, I --

17 MR. DEMO: Right.

18 THE COURT: Neutra can appeal, HCLOF can appeal, but  
19 I'm not seeing the benefit to Highland.

20 MR. DEMO: And I guess the only thing I would say,  
21 Your Honor, is if there is an improper benefit, we are not  
22 saying that the fee applications are sacrosanct. People can  
23 challenge the improper benefit there.

24 And again, the settlement gave broad discretion to the  
25 Committee to pursue insider claims. So if an insider is

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1 receiving a benefit from this, the Committee has standing to  
2 pursue that.

3 So it's not a null set, Your Honor, whereas cutting off  
4 the appeal now does take away that possibility.

5 THE COURT: How would I be cutting off the appeal?  
6 I'm not cutting off the appeal. King & Spalding can go in  
7 there and fight hard. Foley can go in there and fight hard  
8 for Neutra. So, --

9 MR. DEMO: One second, Your Honor.

10 (Counsel confer.)

11 MR. DEMO: And I guess, you know, Your Honor, and I  
12 do want to reiterate that there is no other party with an  
13 economic incentive to fight the Neutra appeal the way that the  
14 Debtor has an economic incentive.

15 THE COURT: That makes no sense to me. HCLOF is the  
16 one who hated this injunction.

17 MR. DEMO: That's not the Neutra appeal, Your Honor.  
18 That's the confirmation order.

19 THE COURT: Well, okay. Neutra gets its company back  
20 if they win.

21 MR. DEMO: And we would get our contracts back.

22 THE COURT: And arguably, it can control Acis, maybe,  
23 okay, and it can assign management contracts to whoever it  
24 wants. That just -- and it says it'll assign them to  
25 Highland. If you can trust Jim Dondero, then Highland's going



1 to benefit if Neutra wins that appeal. Right?

2 MR. DEMO: Yes. Yes, Your Honor.

3 THE COURT: Okay. So that --

4 MR. DEMO: Highland would benefit greatly --

5 THE COURT: Okay.

6 MR. DEMO: -- if Neutra were to win that appeal.

7 THE COURT: Okay. Okay. Well, but first Neutra  
8 benefits, right? And then --

9 MR. DEMO: No.

10 THE COURT: -- Highland only secondarily benefits --

11 MR. DEMO: I -- I --

12 THE COURT: -- if Jim Dondero keeps his word and  
13 gives the management contracts back to Highland.

14 MR. DEMO: Jim Dondero would also have to repay the  
15 \$8 million in claim, even if he didn't reinstate those  
16 contracts. And that \$8 million would be hundred-cent dollars.

17 THE COURT: Okay.

18 MR. DEMO: So, worst case, --

19 THE COURT: It would have been nice to have him  
20 testify as to all of this.

21 MR. DEMO: Worst --

22 THE COURT: It would be more compelling if I had him.

23 MR. DEMO: Well, --

24 THE COURT: Okay? But I don't think --

25 MR. DEMO: -- I can only do so much, Your Honor.

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1 THE COURT: -- that's going to happen anytime soon.

2 MR. DEMO: But I guess worst-case scenario is that  
3 it's \$8 million in hundred-cent dollars.

4 THE COURT: Okay.

5 MR. DEMO: And that's not nothing for \$500,000. And  
6 only a portion of that \$500,000.

7 THE COURT: Okay.

8 MR. DEMO: Thank you, Your Honor.

9 THE COURT: Okay. Mr. Lamberson?

10 MR. LAMBERSON: Your Honor, do you want a closing  
11 from me? Or no?

12 THE COURT: I don't really need it. Thank you.

13 MR. LAMBERSON: Okay.

14 THE COURT: Okay.

15 MR. LAMBERSON: Because I know your hearing starts in  
16 about two minutes.

17 THE COURT: All right. So, I just hate it that we  
18 spent so much time on this. I hate it that we spent so much  
19 time, but, I mean, I understand. I understand. You know, I  
20 think the employment application was filed pretty early in the  
21 case, right, and -- October 29th. And it was continued,  
22 continued, continued, because we were getting objections from  
23 the Committee, or they wanted time to look at it, I guess.  
24 And now you're kind of up against the wire, right, because  
25 oral arguments are set at the Fifth Circuit next month. So I,

1 you know, I hate it that we were here, but I understand it.

2 But I'm concerned. I'm concerned -- well, here's the  
3 deal. We have a great board, and I totally get that  
4 Bankruptcy Courts should defer heavily to the reasonable  
5 exercise of business judgment by a board. And we've got great  
6 professionals. And we've got this case, I think, on a good  
7 track as a general matter now. But I'm concerned that Dondero  
8 or certain in-house counsel has -- you know, they're smart,  
9 they're persuasive -- that -- what are the words I want to  
10 look for -- they have exercised their powers of persuasion or  
11 whatever to make the Board and the professionals think that  
12 there is some valid prospect of benefit to Highland with these  
13 appeals, when it's really all about Neutra, HCLOF, and Mr.  
14 Dondero. That's what I believe.

15 I mean, this is awkward, right, because you want to defer  
16 to the debtor-in-possession, but I have this long history, and  
17 I can think through the scenarios. If this is reversed, here  
18 is how it will play out. If this is reversed, here is how it  
19 might play out. And I know, you know, there are multiple ways  
20 it might play out, but I cannot believe there is a chance in  
21 the world there is economic benefit to Highland if these  
22 things get reversed. Economic benefit to Neutra: Yeah,  
23 maybe. Economic benefit to HCLOF: Well, they'll get what  
24 they want. You know, whether it's an economic benefit, I  
25 don't know. But benefit to Highland? I just don't think the

1 evidence has been there to convince me it's reasonable  
2 business judgment for Highland to pay the legal fees  
3 associated with the appeal.

4 And even more concerning to me is a valid point was made  
5 that Highland is in bankruptcy because of litigation,  
6 litigation, litigation. The past officers and directors and  
7 controls' propensity to fight about everything. This isn't a  
8 balance sheet restructuring, okay? It's not a Chapter 11  
9 caused by operational problems or revenue disruption or who  
10 knows what kind of disruption. It's about years of litigation  
11 finally coming home to roost. And this just appears to be  
12 more of the same, potentially.

13 Okay. Parties have a right to appeal. I respect that.  
14 Neutra, go for it. HCLOF, go for it. But this estate and its  
15 creditors should not bear the burden of having Highland pay  
16 for that, when, again, I don't think there's any evidence to  
17 suggest they could benefit at the end of the day.

18 So what I'm going to do is I'm going to approve the  
19 retention of Foley to represent Highland in the Acis case. We  
20 all know the adversary is stayed right now. It may or may not  
21 ever be un-stayed, depending on what strategies people want to  
22 pursue. But Highland, I think a meritorious case has been  
23 presented, and under 327(e) I will approve Foley representing  
24 Highland in all Acis matters. Okay? The Acis bankruptcy  
25 case. The adversary proceeding, if it goes forward. And so

1 that's my ruling.

2 I will additionally rule, for the avoidance of doubt, that  
3 if Foley wants to represent Neutra in the appeals and get paid  
4 by Neutra, I don't have any problem with that. In other  
5 words, I'm not going to find something like there's a conflict  
6 with the estate, you know, because of its simultaneous  
7 representation of Neutra. That's fine. But I'm not going to  
8 approve Highland paying anything in connection with either of  
9 those appeals. So that is the ruling of the Court.

10 Have I left any gaps here?

11 MR. DEMO: Your Honor, just one clarification.

12 THE COURT: Uh-huh.

13 MR. DEMO: Foley is representing Highland Capital  
14 Management in the appeal of the confirmation order to the  
15 Fifth Circuit. I just want to clarify that your ruling that  
16 Highland can represent -- I'm sorry -- Foley can represent  
17 Highland in all Acis matters extends to their representation  
18 of Highland Capital Management in the appeal of the  
19 confirmation order that's set for March 30th.

20 THE COURT: Okay. Let me think through that.

21 MR. DEMO: And again, Your Honor, there's been no  
22 objection to that.

23 THE COURT: King & Spalding is in there representing  
24 HCLOF. Foley would be representing both Neutra and Highland  
25 in connection with the confirmation order?

1 MR. DEMO: Technically, but Neutra really has  
2 nothing. It's a coattail party in that case. Highland  
3 Capital Management, to the extent that they could bifurcate  
4 Neutra, it would still be doing the exact same work. So if  
5 there is an issue there with the representation of Neutra,  
6 we'd still ask that Foley be allowed to represent Highland  
7 Capital Management in that appeal.

8 THE COURT: Okay. So you're telling me Neutra  
9 doesn't really benefit from that appeal, so you want Highland  
10 to pay all of the fees of Foley in connection with the  
11 confirmation order appeal?

12 MR. DEMO: All I'm asking, Your Honor, is that Foley  
13 can represent Highland Capital Management in that appeal. And  
14 again, there's been no objection to that. What happens with  
15 Neutra, I, you know, I understand your position. I am simply  
16 asking for a clarification that Foley can continue  
17 representing the Debtor in the Debtor's appeal of the  
18 confirmation order.

19 THE COURT: All right. I will say yes to that, but  
20 they need to be prepared to have their fees split. I'm not  
21 saying 50/50, I don't know what the percentage is, but they  
22 are going to be allocated between Neutra and Highland, and  
23 they should not expect to get a hundred percent of those  
24 covered by Highland at the end of the day. Okay? There's  
25 going to be a deep dive into looking at how that allocation

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1 should work, okay?

2 MR. DEMO: And they will be filing fee apps,  
3 obviously, on all of the matters that they are --

4 THE COURT: Okay. Anything else?

5 MR. POMERANTZ: One moment, Your Honor.

6 THE COURT: Okay.

7 (Pause.)

8 MR. DEMO: Yeah. And Your Honor, I do just want to  
9 clarify that when we talk about the involuntary petition  
10 appeal, that when we talk about its effect on the fraudulent  
11 conveyance action, to the extent that -- and I would like to  
12 clarify your position on this, Your Honor. Is your position  
13 that the appeal of the involuntary, if successful, would have  
14 no impact on the fraudulent conveyance actions in the Acis  
15 litigation?

16 Because I do think that it is clear that --

17 THE COURT: I think we don't know. We would have to  
18 see --

19 MR. DEMO: And I guess that's -- that's --

20 THE COURT: -- what the Fifth Circuit states.

21 MR. DEMO: And my --

22 THE COURT: And it may be: Bankruptcy Court, stay  
23 the proceedings and defer, send it to arbitration. "It" being  
24 re-litigation of --

25 MR. DEMO: Understood.

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1 THE COURT: -- the involuntary.

2 MR. DEMO: And --

3 THE COURT: That may be, to me, a likely scenario,  
4 but maybe not.

5 MR. DEMO: And -- and --

6 THE COURT: Maybe they'll say something else.

7 MR. DEMO: Understood. And I think we're honestly on  
8 the same page with that.

9 THE COURT: Uh-huh.

10 MR. DEMO: Because to the extent that it does put it  
11 into arbitration, to the extent that there is that  
12 possibility, that it changes the color of those fraudulent  
13 conveyance claims, changes the color of Acis's \$300 million  
14 proof of claim, which goes to settlement strategy, which goes  
15 to the benefits to other creditors, which goes to a whole  
16 panoply of other things that tie into a benefit to the estate.  
17 And I don't want to re-argue what we've already argued, but I  
18 think, as Your Honor said, that chance that there is going to  
19 be a change to the fraudulent conveyance, either because it  
20 throws them into an arbitration or because it somehow  
21 otherwise colors it, is, in and of itself, a substantial  
22 benefit to the estate -- leaving aside the dollars from the  
23 contracts, leaving aside the \$8 million proof of claim --  
24 because that benefit goes to, again, that \$300 million proof  
25 of claim that Acis has filed, which impacts the estate, which



1 impacts other creditors, and which impacts the settlement  
2 mechanics in this case.

3 So to the extent that there is a chance that the  
4 involuntary changes that and recolors it, there is a  
5 substantial benefit to the estate in that, because it allows  
6 the estate to work with creditors --

7 THE COURT: I mean, --

8 MR. DEMO: -- to figure out a way to settle claims in  
9 a way that are --

10 THE COURT: I get what you're saying, but guess what?  
11 You can object to that \$300 million proof of claim. And we  
12 might have a very interesting conversation about --

13 MR. DEMO: What --

14 THE COURT: Well, it's the same judge either way, but  
15 -- well, I guess I don't get what you're saying. You have the  
16 ability to object to the proof of claim whether there's  
17 affirmance or --

18 MR. DEMO: Yeah. But --

19 THE COURT: -- reversal, right? I'm just --

20 MR. DEMO: We don't have a -- you know, we may not  
21 have to get -- I'm sorry, Your Honor, and I'll stop it -- but  
22 we may not have to get there. Objecting to the proof of claim  
23 is quali... it is quantitatively and qualitatively different  
24 than a Fifth Circuit order saying that there are changes to  
25 the fraudulent conveyance, there are changes to the

1 distribution of equity under the plan. Maybe there is no plan  
2 -- or maybe there is no bankruptcy at all.

3 Those things fundamentally change the dynamics of this  
4 case in a way that's good for the estate. And those things  
5 can only happen if there's an order from the Fifth Circuit  
6 entering that. We can object all down the pipe, and we are  
7 going to object, Your Honor, and I assume other people will  
8 object as well. But our objecting does not have the same  
9 benefit to the estate as a Fifth Circuit opinion saying,  
10 Fraudulent conveyance claims go to arbitration; saying, There  
11 is no involuntary petition.

12 Now, I understand that there are questions as to the  
13 probability of those things, but the fact that there is a  
14 probability of those things happening and the cost to the  
15 estate is a hundred thousand dollars, I understand what Your  
16 Honor has said and I don't want to overstay my welcome, but I  
17 do think we are -- at least maybe I am presenting it wrong --  
18 but that Fifth Circuit order either way is going to calcify  
19 and solidify this in ways that are beneficial to the estate  
20 and beneficial to how this bankruptcy is going to progress.

21 THE COURT: Okay. I understand you feel passionately  
22 about that, but just so you know, for future purposes or not,  
23 I'm not there because, you know, among other things, we -- you  
24 know, life has changed. You know, if the Fifth Circuit says  
25 reversal, not a darn thing should happen in a bankruptcy case

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1 of Acis, you know, it can all go to arbitration, well, that's  
2 the Acis litigation, right? But Acis has filed a proof of  
3 claim now. And are you going to tell me the Fifth Circuit is  
4 going to say the arbitration that should have happened in the  
5 earlier Acis case trumps, if you will, adjudication of a proof  
6 of claim now in a new case?

7 MR. DEMO: And the claims are --

8 THE COURT: I mean, I'm just -- someone mentioned  
9 *Gandy* and *National Gypsum*, and there's even a more recent  
10 Fifth Circuit case dealing with arbitration which --

11 MR. DEMO: The claims, Your Honor, are state law  
12 claims if there's no bankruptcy, and I think --

13 THE COURT: But there is a bankruptcy. There's a  
14 Highland bankruptcy now. And there's a proof of claim --

15 MR. DEMO: Not if the Fifth Circuit --

16 THE COURT: -- in the Highland case.

17 MR. DEMO: -- overturns the involuntary petition.

18 THE COURT: Yeah. I just -- okay. We're just, we're  
19 having academic conversations, and I'm probably guilty for  
20 going down this trail. So, anyway, is there anything further,  
21 then?

22 MR. LAMBERSON: No, Your Honor.

23 THE COURT: I need a few orders.

24 MR. LAMBERSON: If they want to prepare an order and  
25 send it to us, we're happy to look --

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1 THE COURT: Okay. Thank you all.

2 (Proceedings concluded at 1:44 p.m.)

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CERTIFICATE

21 I certify that the foregoing is a correct transcript from  
22 the electronic sound recording of the proceedings in the  
above-entitled matter.

23 /s/ Kathy Rehling

02/20/2020

24

25 Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

Date

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## EXHIBIT 25

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

IN RE: . Case No. 19-34054-11(SGJ)  
.  
HIGHLAND CAPITAL . Earle Cabell Federal Building  
MANAGEMENT, L.P., . 1100 Commerce Street  
.  
Debtor. . Dallas, TX 75242-1496  
.  
March 4, 2020  
1:31 p.m.

TRANSCRIPT OF HEARING ON MOTION OF THE DEBTOR FOR ENTRY OF AN  
ORDER AUTHORIZING, BUT NOT DIRECTING, THE DEBTOR TO CAUSE  
DISTRIBUTIONS TO CERTAIN "RELATED ENTITIES"  
BEFORE HONORABLE STACEY G. JERNIGAN  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For Highland Capital Management: Pachulski Stang Ziehl & Jones, LLP  
By: JEFF POMERANTZ, ESQ.  
GREG DEMO, ESQ.  
10100 Santa Monica Blvd., 13th Floor  
Los Angeles, CA 90067

Hayward & Associates PLLC  
By: MELISSA HAYWARD, ESQ.  
ZACHARY ANNABLE, ESQ.  
10501 N. Central Expy, Ste. 106  
Dallas, TX 75231

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APPEARANCES (Cont'd):

For Acis Capital Winstead, P.C.  
Capital Management: By: RAKHEE V. PATEL, ESQ.  
2728 N. Harwood Street, Suite 500  
Dallas, TX 75201

Rogge Dunn Group, PC  
By: BRIAN SHAW, ESQ.  
500 N. Akard St., Suite 1900  
Dallas, TX 75201

For Official Committee Sidley Austin LLP  
of Unsecured Creditors: By: MATT CLEMENTE, ESQ.  
DENNIS TWOMEY, ESQ.  
One South Dearborn  
Chicago, IL 60603

Sidley Austin LLP  
By: PENNY REID, ESQ.  
2021 McKinney Avenue, Suite 2000  
Dallas, TX 75201

For CalPERS: Singer & Levick, P.C.  
By: MICHELLE SHRIRO, ESQ.  
16200 Addison Road, Suite 140  
Addison, TX 75001

For James Dondero: Lynn, Pinker, Cox & Hurst, LLP  
By: MICHAEL LYNN, ESQ.  
JOHN BOND, ESQ.  
2100 Ross Avenue, Suite 2700  
Dallas, Texas 75201

For Redeemer Committee: Frost Brown Todd LLC  
By: MARK PLATT, ESQ.  
100 Crescent Court, Suite 350  
Dallas, TX 75201

For Issuers Group: Jones Walker LLP  
By: AMY ANDERSON, ESQ.  
811 Main Street, Suite 2900  
Houston, TX 77002

APPEARANCES (Cont'd):

TELEPHONIC APPEARANCES:

For CalPERS:

Nixon Peabody, P.C.  
By: LOUIS CISZ, ESQ.  
One Embarcadero Center, 32nd Floor  
San Francisco, CA 94111

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1 THE COURT: -- set a motion of the debtor for entry  
2 of an order authorizing but not directing the debtor to cause  
3 distributions to certain related entities.

4 Let's get lawyer appearances in the courtroom.

5 MR. POMERANTZ: Good afternoon, Your Honor. Jeff  
6 Pomerantz and Greg Demo, Pachulski Stang Ziehl & Jones, on  
7 behalf of the debtors.

8 THE COURT: Thank you.

9 MS. HAYWARD: Good afternoon, Your Honor. Melissa  
10 Hayward and Zachary Annable of Hayward & Associates on behalf  
11 of the debtor.

12 THE COURT: Thank you.

13 MR. CLEMENTE: Good afternoon, Your Honor. Matthew  
14 Clemente, Dennis Twomey, and Penny Reid from Sidley Austin on  
15 behalf of the Official Committee of Unsecured Creditors.

16 THE COURT: Thank you.

17 MS. SHRIRO: Good afternoon, Your Honor. Michelle  
18 Shriro on behalf of CalPERS. And I also have my co-counsel  
19 Louis Cisz from Nixon Peabody, and he is -- he should be on the  
20 line.

21 THE COURT: Okay. Thank you.

22 MR. LYNN: Good afternoon, Your Honor. Michel Lynn  
23 and John Bonds for James Dundero.

24 THE COURT: Okay. Thank you.

25 MS. PATEL: Good afternoon, Your Honor. Rakhee

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1 Patel, Winstead PC, on behalf of Acis Capital Management, LP,  
2 and Acis Capital Management, GP, LLC. Also, I have my co-  
3 counsel Mr. Brian Shaw of the Rogge Dunn Firm on behalf of the  
4 same clients.

5 THE COURT: Thank you.

6 MR. PLATT: Good afternoon, Your Honor. Mark Platt  
7 firm Frost Brown Todd on behalf of the Redeemer Committee of  
8 the Highland Crusader Fund. And I believe Terry Mascherin is  
9 on the phone, as well --

10 THE COURT: All right.

11 MR. PLATT: -- from Jenner & Block.

12 THE COURT: Thank you.

13 MS. ANDERSON: Good afternoon, Your Honor. Amy  
14 Anderson with Jones Walker on behalf of the Issuers. I believe  
15 Mr. James Bentley with Schulte Roth is also on the phone on  
16 behalf of the same parties.

17 THE COURT: Okay. Thank you.

18 All right. We do have a large number of people on  
19 the phone. I'm just going to go through the live lines and  
20 take roll. Asif Attarwalla for UBS, are you there?

21 MR. ATTARWALLA: Here. Yes, Your Honor.

22 THE COURT: All right. James Bentley?

23 MR. BENTLEY: Yes, Your Honor. I'm here.

24 THE COURT: Okay. Also Jeff Bjork from Latham?  
25 Yes/no?

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1 (No response)

2 THE COURT: All right. Earnestiena Cheng for FTI?

3 MS. CHENG: Yes, Your Honor.

4 THE COURT: Okay, thank you. And Louis Cisz, I think  
5 we heard he was CalPERS co-counsel. Are you there?

6 MR. CISZ: Yes, I am, Your Honor.

7 THE COURT: All right. Thank you. Kimberly Gianis  
8 for Contrarian? Yes/no?

9 (No response)

10 THE COURT: All right. Terry Mascherin, I think we  
11 heard he was there for the Redeemer Committee.

12 MR. MASCHERIN: Yes, Your Honor.

13 THE COURT: Okay. I'll just ask anyone else on the  
14 phone who wishes to appear, go ahead at this time.

15 (No response)

16 THE COURT: All right. That may be it.

17 All right. Mr. Pomerantz, I see a 20-minute time  
18 estimate on our calendar. I'm not sure where that came from,  
19 but that --

20 MR. POMERANTZ: I think that's quite aggressive.

21 THE COURT: Okay.

22 MR. POMERANTZ: Good afternoon again, Your Honor.  
23 Jeff Pomerantz, Pachulski Stang Ziehl & Jones. First, I want  
24 to thank Your Honor for scheduling the hearing on shortened  
25 time. I would also like to introduce once again the three

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1 members of the independent board who have been appointed  
2 pursuant to the settlement, Your Honor, that Your Honor  
3 approved on January 9th. That's James Seery, John Dubel, and  
4 Russell Nelms.

5 THE COURT: Okay. Hello.

6 MR. POMERANTZ: I thought it might be helpful, Your  
7 Honor, to provide Your Honor with a brief background of each  
8 board member, how they have been approaching their duties as  
9 independent directors, and what the focus has been the first  
10 two months of the case. And then I will go into the background  
11 of this present motion.

12 THE COURT: Okay.

13 MR. POMERANTZ: James Seery will be the debtor's  
14 witness at today's hearing, and he's a 30-year restructuring  
15 lawyer with extensive experience with high-yield and distressed  
16 investing both as a principal and manager which is precisely  
17 the business in which the debtors operate. He is an attorney  
18 licensed to practice in New York who has passed and held the  
19 Series 7, 63, 79, SIE and Series 24 FINRA principal  
20 designations.

21 From April 2012 to 2017, he was the president and  
22 senior investing manager of RiverBirch Capital. And RiverBirch  
23 is an SEC-registered investment advisor managing a \$1.3 billion  
24 global long short fund that focused on high yield loans, bonds,  
25 CLOs, and distressed investments. Prior to that, Mr. Seery

1 spent ten years as a senior high yield manager at Lehman  
2 Brothers, and he was the global head of Lehman Brothers fixed-  
3 income loan business.

4 Accordingly, Mr. Seery brings to his role as an  
5 independent director a unique combination of a legal  
6 background, restructuring experience, and a deep knowledge of  
7 the highly regulated business in which the debtor operates.

8 Mr. Dubel brings 35 years' practice in the  
9 restructuring area. His experience includes turnaround  
10 management, crisis management, operational restructurings, and  
11 corporate acquisitions and divestitures. He's worked at both  
12 sides of the table, both on the company side and other side.  
13 And he brings a unique perspective to each situation, and he  
14 spent the last ten years being an independent director for a  
15 wide range of distressed companies including Purdue Pharma  
16 which obviously is the newest in current Chapter 11, WMC  
17 Mortgage, Wartaco (phonetic), FXI, and ResCap.

18 And as an independent board member, he's played a  
19 principle role in overseeing management, negotiating with  
20 creditors, supervising and investigating resolution, either  
21 consensually or through litigation of insider and affiliate  
22 claims, and also spearheading reorganization efforts.

23 I'm sure Your Honor is familiar with Russell Nelms  
24 but briefly he was a distinguished bankruptcy litigator with  
25 Carrington Coleman for 20 years which followed a stint of six



10

1 years as a United States Army judge advocate, and also he sat  
2 with the bankruptcy court here in Fort Worth from 2004 to 2018.

3 Your Honor, these individuals bring a complementary  
4 skill set to the independent board that have made them uniquely  
5 qualified to manage the debtor's restructuring efforts in this  
6 case, that bring a combination of sophisticated asset  
7 management experience, financial restructuring, a legal  
8 insolvency background, and judicial experience. They've been  
9 involved in many cases on all sides of the aisle, whether it's  
10 been alleged wrongdoing or questionable conduct with people  
11 they've ever had to supervise as a board member, advise as a  
12 restructuring lawyer, work with as a financial advisor, or  
13 administer their cases as a judge.

14 Mr. Seery and Dubel were selected by the Committee  
15 not only because of their relevant expertise but because of  
16 their commitment to independence and ability to stand up to  
17 strong personalities that exist on all sides of this case. Mr.  
18 Nelms, while originally identified by the debtor, was scheduled  
19 by the Committee, and was ultimately chosen to be the third  
20 board member by Mr. Seery and Dubel from a group of highly-  
21 qualified candidates.

22 Your Honor, I provide this background to stress that  
23 the independent board consists of individuals whose background  
24 and experience speak to their independence, experience, and  
25 strength, and who take their job seriously to do what they

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1 believe is right for this debtor, and they're not bring  
2 influenced by any party in this case, be that the debtor, Jim  
3 Dondero, members of the management committee, members of the  
4 debtor's management, or the creditors' committee. The  
5 reputations of each of these gentlemen at are stake in a case  
6 like this, and they take their attendance very seriously.

7           Upon taking over on January 9th, 2020, the board  
8 quickly made a few observations about the current circumstances  
9 that have guided their actions today. First, the board  
10 understood that the debtor was where it was in part due to many  
11 years of intense litigation arising out of sometimes aggressive  
12 management decisions or failure to settle certain employee  
13 disputes and that the litigation led to cost and diversion of  
14 time and energy for what the debtor did best which was manage  
15 assets.

16           The board concluded that for case to succeed, the  
17 board would have to chance the culture from one of litigation  
18 to reconciliation and consensus building. It doesn't mean that  
19 the debtor will back down from defending itself from claims  
20 that it doesn't believe are legitimate but rather the  
21 litigation that the company under their watch would be involved  
22 in would need to be carefully vetted by the independent board,  
23 outside advisors, and the results of which would guide the  
24 board's conduct.

25           The board's focus has and continues to be operating

1 the debtor's business in accordance with its obligations of  
2 their debtor in possession in conformance with its statutory,  
3 contractual, and fiduciary obligations as an investment  
4 advisor. By scrupulously meeting its obligations as an  
5 investment advisor, the debtor will continue to enhance the  
6 asset management business and avoid the litigation that  
7 contributed to this case.

8           Second, the board understood the relationship between  
9 the debtor's largest creditors and senior management had  
10 materially deteriorated and that there was severe lack of trust  
11 that creditors had with respect to management. The board  
12 initially determined, has determined to continue retaining the  
13 services of senior management because it believes that their  
14 historical background and deep knowledge of the debtor's assets  
15 provide material value to the estate. However, the board's  
16 decisions thus far have and will continue to be based upon  
17 their independent review of the facts and circumstances and  
18 based upon consultation with outside advisors as appropriate.

19           Third, the board believe that a lengthy stay in  
20 Chapter 11 only would serve to erode asset value while at the  
21 same time leading to extensive restructuring costs. The Court  
22 and the board developed a timeline that will hopefully lead to  
23 a confirmed plan at the end of the year.

24           Against this backdrop, the board is focused on the  
25 following things the first two months of the case. Initially,

1 the board met with all department heads and other members of  
2 senior management including Mr. Dondero and let them know that  
3 the board was now in charge and that all business decisions  
4 needed to be run by the board subject to the board delegating  
5 authority as it deemed appropriate.

6           The board has had several calls with the committee  
7 and its professionals to discuss among other things the board's  
8 initial determination as to staffing levels and employee  
9 compensation, time-sensitive transactions that needed the  
10 committee's input under the Court's approved operating  
11 protocols, and the proposed timeline for achieving  
12 restructuring. There is an in-person meeting scheduled next  
13 week in New York City between all the committee members and  
14 their professionals and the debtor and their professionals.

15           Members of the board have also reached out to  
16 individual committee members and have had or will have meetings  
17 with them to understand their specific concerns with the debtor  
18 and to importantly have a dialogue about the claims they have  
19 against the debtor, as resolving the claims against the debtor  
20 is a key part of achieving a consensual restructuring in this  
21 case.

22           The debtor's asset basis is also extremely complex,  
23 and the board has worked hard to get a grasp on how best to  
24 maximize their value. The board has analyzed the debtor's  
25 liquidity needs and worked with the debtor's chief

1 restructuring officer to develop a 13-week cash flow and  
2 otherwise address how to enhance liquidity. The board has also  
3 conducted a thorough review of the debtor's employee basis,  
4 including performance reviews and address ongoing staffing and  
5 compensation in a manner that the board believes will sustain  
6 the debtor's business operations and maximize value.

7           Related to the motion before the Court, the board has  
8 evaluated the status of certain funds which were in the process  
9 of being wound down at the commencement of the case and has  
10 supervised their wind-down in a manner consistent with the  
11 debtors' fiduciary, statutory, contractual liabilities. The  
12 board has also commissioned outside counsel to provide an  
13 independent analysis of the significant litigation claims that  
14 are facing the debtor. And as I mentioned, the board  
15 anticipates engaging with these creditors to seek a resolution.

16           The board is acutely aware that resolving  
17 consensually claims of creditors and claims the estate has  
18 against third parties is the only way to restructure this  
19 debtor efficiently and economically. I'll now turn Your Honor  
20 to the background with respect to the motion, explain the  
21 relief requested, and address the two objections that are  
22 before the Court.

23           Your Honor will hear testimony from Mr. Seery that  
24 the debtor is the asset manager of two hedge funds, Dynamic and  
25 ARF, that are in liquidation because of redemption requests

1 from large non-affiliated investors that render the funds  
2 economically not viable. The term of the third fund, which is  
3 a private equity fund, Restoration Capital expired, and the  
4 governing board comprised of large institutional pension funds  
5 has refused to grant further extensions.

6 Mr. Seery will testify that while these wind-downs  
7 were already in process and fully disclosed to the Court prior  
8 to the installation of the independent board, the board  
9 evaluated the decision to wind down the funds independently of  
10 the debtor's decision and decided that the prudent exercise of  
11 the debtor's business judgment was to continue with the wind-  
12 down. Neither the committee nor Acis challenge the board's  
13 selection to continue with the wind-down.

14 You will hear testimony from Mr. Seery that a  
15 priority of the independent board was to make sure that the  
16 debtor operated in accordance with applicable law to ensure  
17 that the debtor fills its obligations to investors and doesn't  
18 act or fail to act in a manner which could expose the debtor to  
19 liability. After all, as I mentioned, Your Honor, a material  
20 reason why the debtor is before the Court is because of  
21 litigation claims that have plagued it over the last several  
22 years.

23 Mr. Seery will testify that in evaluating the  
24 debtor's duties and obligations as an asset manager of these  
25 three funds, the board consulted with bankruptcy counsel with

1 respect to the applicability of the operated protocols and  
2 domestic and Cayman counsel specializing in advising funds with  
3 respect to their obligations under the transactional documents,  
4 the Advisors Act, and general fiduciary duty obligations.

5 Tim Silva, a partner of WilmerHale, the debtor's  
6 outside firm that provides fund advice, is present in the  
7 courtroom and will be available to answer any questions the  
8 Court or the parties have. Dennis Olarou, a partner with Carey  
9 Olsen, is on the phone. He is the debtor's Cayman counsel and  
10 also available.

11 Importantly, Mr. Seery will testify that the  
12 independent board made the decisions that led to the filing of  
13 this motion based upon their own expertise and the advise of  
14 outside counsel and did not rely on the advice of the debtor's  
15 employees or any of the related parties.

16 He will further testify that based upon the input of  
17 outside counsel, the independent board concluded, one, that the  
18 operating documents governing the funds did not permit the  
19 debtor to unilaterally withhold distributions from some  
20 investors and not others; that, two, the debtor risked  
21 breaching its fiduciary duty to investors under principles of  
22 common law if it withheld distributions on its own; and that,  
23 three, the debtor risked liability under the Advisors Act if it  
24 essentially attempted to use its position as an investment  
25 manager to gain leverage against investors in connection with

1 an unrelated matter, to wit, potential claims that the estate  
2 may have.

3           The motion describes in detail the nature and extent  
4 of the debtor's obligations, and I think the substance of that  
5 is not challenged by either the Committee or Acis. I didn't  
6 read their objections to challenge that the debtor has these  
7 obligations and seeks to fulfill them.

8           Based upon the foregoing and to make sure that the  
9 debtor didn't expose itself to liability, Mr. Seery will  
10 testify that the board decided that it was obligated to  
11 exercise its authority as asset manager to distribute the funds  
12 to all investors. After consultation with the bankruptcy  
13 counsel, Mr. Seery will testify that the independent board  
14 decided to provide the Committee with notice prior to making  
15 such distributions as were required by the operating protocols  
16 approved as part of the settlement.

17           The Committee objected to the distributions which led  
18 to the filing of this motion. The objections relate to  
19 distributions to be made as follows. Mr. Seery will testify  
20 that Dynamic proposes to distribute \$35 million of investor  
21 funds that are held by Dynamic of which CLO Holdco stands to  
22 receive \$872,000 and Mr. Okada stands to receive \$4,176,000.

23           With respect to ARF, Mr. Seery will testify that they  
24 propose to distribute \$22 million of investor funds held by  
25 ARF. HoldCo stands to receive \$1.5 million. And with respect



1 to Restoration Capital Partners, it proposes to distribute  
2 \$123,250,000 of which 2.1 million will be received by ACM  
3 Services and, importantly, the debtor will receive 18 and a  
4 half million dollars, the balance of approximately 121 million  
5 would be distributed to non -- or 103 million would be  
6 distributed to non-related parties, including CalPERS which  
7 filed the statement with the Court.

8           The Committee and Acis argue that the Court should  
9 prohibit the debtor from making distributions to related  
10 parties, notwithstanding the debtor has contractual, fiduciary,  
11 statutory obligations to do so as an asset manager. It is  
12 important for the Court to understand that the money to be paid  
13 to these related parties is not the debtor's money, it's not  
14 property of the estate. It's actually funds that are the  
15 investors' funds that were invested in these various funds.

16           Essentially, the Committee argues and Acis argues  
17 that because the debtor may assert claims against some of all  
18 of these related parties at some time in the future, the Court  
19 should prohibit the debtor from authorizing the distribution of  
20 non-debtor estate funds. Essentially as we said in our papers,  
21 the objectors are asking this Court to issue a pre-judgment  
22 writ of attachment adjoining these distributions without the  
23 filing of any complaint which would assert causes of action,  
24 without the need to satisfy applicable standards for a pre-  
25 judgment writ either under Federal Rule of Civil Procedure 64

1 estate law, and without appropriate notice to the parties and  
2 an opportunity to object.

3           The objectors want to use the debtor's position as an  
4 asset manager to stop distribution of funds in which the debtor  
5 has no interest to gain a potential litigation advantage  
6 against these related parties. The debtor just submits that is  
7 not appropriate. The Committee and Acis spent a lot of time in  
8 their papers talking about the allegations and in some estate  
9 case findings against the debtor's prior management relating to  
10 the operation of the debtor's business, some of which have  
11 matured into claims against the estate.

12           However, the fact that the debtor's actions taken by  
13 prior management led to claims against the debtor is not  
14 legally relevant as to whether the debtor should be permitted  
15 to make these distributions of non-estate funds. Allegations  
16 of prior wrongdoing would not be sufficient in the context of a  
17 pre-judgment attachment, and it should not form the basis for  
18 essentially the injunctive relief the Committee and Acis urge  
19 to the Court.

20           The Committee also argues that because the  
21 Committee's currently investigating claims against the released  
22 parties and other insiders that the distribution should be held  
23 up essentially indefinitely until the Committee completes its  
24 investigation. Whether or not the estate has claims against  
25 the related parties and insiders is unknown at this point

1 except for the notes which I will address in a moment.

2           Also, whether or not there are claims and how the  
3 related parties acquired their investment in the funds is also  
4 unknown at this time. Since January 9th, the Committee has had  
5 standing to investigate and prosecute these claims and the  
6 debtor is cooperating with the Committee in its investigation.  
7 If legitimate claims exist, they should most certainly be  
8 prosecuted, and the independent board will cooperate with the  
9 Committee in its efforts.

10           However, at this point other than with respect to the  
11 notes, there is no admissible evidence that any claims exist,  
12 and no claims have been clearly articulated other than some  
13 vague allegations of fraudulent conveyance, breach of fiduciary  
14 duty, the garden variety of claims you would expect to be  
15 asserted in a case like this. Again, no bankruptcy court, no  
16 non-bankruptcy court would be authorized to enjoin payments on  
17 the basis of these vague and unasserted claims, and the Court  
18 shouldn't accept the invitation to do so wither.

19           The Committee also points to certain demand notes  
20 executed by Jim Dondero, Mark Okada, and ACM Services in favor  
21 of the debtor as a basis for withholding the distributions.  
22 The debtor has made a demand on Mr. Okada to pay back the note,  
23 and he has asserted that he may have potential offsets and the  
24 nature of potential service obligations and expense  
25 reimbursements allegedly owed to. At some point in time, we

1 suspect those issues will be resolved either consensually or  
2 there will be litigation to recover the demand.

3           ACM Services which is owned 75 percent by Mr. Dondero  
4 and 25 percent by Mr. Okada, executed several notes in favor of  
5 the debtor of which 850,000 are demand notes. The total amount  
6 is approximately seven and a half million. The remaining notes  
7 are current and have been paid down over the years.

8           The debtor has not made demand on ACM Services for  
9 payment of the notes, nor have they made demand on Mr. Dondero  
10 for payment of the notes he issued in favor of the debtor. Mr.  
11 Seery will testify that the reason for that is that, as I  
12 indicated before, the board recognizes that in order for there  
13 to be a consensual restructuring in this case, it's going to  
14 involve not only resolution with the creditors and their claims  
15 but also resolution with Mr. Dondero or potential claims the  
16 estate has.

17           The independent board at this early stage in the case  
18 does not believe that commencement of an adversary proceeding  
19 against Mr. Dondero at this time is in their best interest. If  
20 this case turns into a litigation case, and as Your Honor  
21 experienced previously, then such litigation will be commenced.  
22 However, until the board has the opportunity to try to forge a  
23 consensual resolution, aggressive action is premature. The  
24 last thing, Your Honor, CLO Holdco is not a party to any demand  
25 notes.

1 THE COURT: Let me stop you.

2 MR. POMERANTZ: Sure.

3 THE COURT: You mentioned dollars on the notes. The  
4 note receivable from Okada I think is 1.3 million.

5 MR. POMERANTZ: With credentials, yes.

6 THE COURT: And then you mentioned roughly seven and  
7 a half million of notes receivable from HCM Services.

8 MR. POMERANTZ: Of which 950 are demand notes. The  
9 rest are currently before me in accordance with the terms.

10 THE COURT: Okay. You didn't mention a dollar amount  
11 on the note receivable from Dondero. My notes show 9.3  
12 million.

13 MR. POMERANTZ: Yeah, and so I think that's around  
14 that --

15 THE COURT: Is that a demand note or notes?

16 MR. POMERANTZ: That is a demand note and then the  
17 related party notes, yes --

18 THE COURT: Okay.

19 MR. POMERANTZ: -- Your Honor. And, again, we're now  
20 the board knows, fully aware. The board could have commenced a  
21 lawsuit. Honestly, Your Honor, the Committee could have  
22 commenced a lawsuit in the last two months. I suspect the  
23 Committee also would like to see a consensual restructuring.

24 And I think parties are taking the view of, again,  
25 this can be a litigation case which would be like a lot of

1 money for all the professionals, not really do all that well  
2 for the creditors. Or the parties could cooperatively work  
3 towards a restructuring to see based upon the leverage, based  
4 upon the claims everyone has that it makes more sense. And the  
5 board's determination, again, made on its own coming into this  
6 case in the last two months is that proceeding aggressively now  
7 just does not make sense.

8           Even though it has not commenced any litigation  
9 against the related parties nor presented any evidence of any  
10 claims against the related parties, the Committee asks this  
11 Court to use its equitable powers under Section 105 to enjoin  
12 the distribution again of non-estate funds to the related  
13 parties. Your Honor, bankruptcy court -- bankruptcy  
14 practitioners in certain cases love to use 105, assert 105. My  
15 experience has been when you assert 105 and that's all you  
16 assert 105, it really means you don't have much authority and I  
17 think that's the case here.

18           The courts have held that 105 is not -- grant the  
19 court authority to be a roving commission to do equity because  
20 it has to be tethered to something in the Bankruptcy Code.  
21 Here the proper way for the Committee to obtain the relief they  
22 sought was to file a complaint and seek pre-judgment remedy,  
23 either an attachment under Rule 64 or an attachment under  
24 applicable provisions of Texas law or other applicable law, or  
25 an injunction under FRCP 65.

1           The debtor would not stand in the way if the  
2 Committee decided to do that. That's what the debtor bargained  
3 for. They gave the Committee the authority to do that. The  
4 Committee has not yet done that. And the Court should just not  
5 allow the debtor -- the Committee to use the debtor's position  
6 as fiduciary to its investors as leverage. That's what's  
7 really happening. The only reason we're here is because the  
8 debtor is the asset manager of these other funds, and the  
9 Committee and Acis want the debtor to use that leverage and  
10 somehow to gain an advantage.

11           Your Honor, we would submit that the fiduciary duty  
12 of the estate is to act in accordance with its obligations, and  
13 that's the primary fiduciary duty and that the creditors are  
14 best served if the company complies with its obligations and  
15 doesn't expose the estate to any liability.

16           Lastly, Your Honor, I want to address the Committee  
17 and Acis's allegations regarding the circumstances surrounding  
18 the sale of the MGM shares, the proceeds of which the debtors  
19 intend to use to distribute as part of the RCP fund. Whether  
20 or not Mr. Dondero's authorized to make that trade, it's really  
21 irrelevant to the issues before the Court. The independent  
22 board first learned about the trade only a few weeks ago, and  
23 the independent board -- and, again, this happened back in  
24 November, two months before the independent board took over.  
25 They promptly investigated the circumstances around the trade,

1 engaged counsel to advise whether it was binding and,  
2 importantly, evaluated whether the trade was a sound exercise  
3 in the debtor's business judgment at that time.

4           The board concluded that the trade was binding and  
5 that it in fact was a good trade as of November 2019 and  
6 disclosed that information to the Committee and engaged the  
7 Committee in a dialogue to discuss the options that the debtor  
8 had with respect to that trade. The Committee, while I  
9 understand was not unanimous, ultimately agreed with the  
10 independent board that it was in the debtor's best interest to  
11 consummate that trade. While we understand that the Committee  
12 and Acis may want to investigate the circumstances surrounding  
13 that trade to determine whether the estate has any colorable  
14 claims that could be asserted, that doesn't provide a basis for  
15 enjoying the distribution of the funds.

16           Moreover, the allegation in Acis papers that Mr.  
17 Dondero used his position on the board of MGM to facilitate the  
18 trade so that ACM Services could receive \$2.1 million of 123  
19 and \$250,000 sale, it just lacks and factual support. And, in  
20 fact, Mr. Dondero has steadfastly encouraged the investment  
21 board not to sell the MGM shares because he believes they will  
22 continue to appreciate and the estate and its creditors would  
23 be benefitted thereby.

24           The reason that the RCP shares were sold is as I  
25 mentioned before, the RCP, the term of that private equity fund



1 expired. No more extensions were given, and the debtor as a  
2 fiduciary and as an asset manager needed to liquidate the  
3 assets in that estate which included the shares. But, again,  
4 if there are claims surrounding how that happened, we  
5 understand there's concern that the creditors have about the  
6 circumstances, they can investigate them and the independent  
7 board will surely cooperate with such investigation.

8 In conclusion, Your Honor, this independent board was  
9 installed because of its independence and sophistication in  
10 managing a business as complex as the debtor's. As you will  
11 hear in the testimony, the independent board has been  
12 thoughtful and thorough in its approach to the issues raised by  
13 this motion and is trying to manage the debtor in a responsible  
14 way to maximize value and prevent the estate from incurring any  
15 liability. The independent board understands and shares the  
16 Committee's and Acis's decision to hold other parties  
17 accountable for any liability they have against the debtor  
18 arising out of conduct that occurred pre- or post-bankruptcy.  
19 But trying to use the debtor's role as an independent asset  
20 manager and fiduciary duty to investors is inappropriate and  
21 create risks for the estate.

22 For these reasons, Your Honor, the debtor  
23 respectfully requests that the Court approve the motion and  
24 overrule the objections.

25 THE COURT: All right, thank you. Other opening

1 statements, Mr. Clemente?

2 MR. CLEMENTE: Yes, Your Honor. You actually touched  
3 on a question that I had. I assume I have more fulsome  
4 comments that I had anticipated making after testimony, but so  
5 I would reserve the opportunity to do that. It was quite a  
6 lengthy opening there, so I didn't know whether there was going  
7 to be the opportunity for that after testimony, but --

8 THE COURT: Certainly.

9 MR. CLEMENTE: -- I certainly want to reserve that.  
10 Thank you, Your Honor.

11 So I do have some opening remarks prepared, but I'm  
12 going to react a little bit to what I just heard. I and the  
13 Committee do not dispute the credentials of the board. We  
14 obviously were involved in choosing them. I heard a lot about  
15 the duty to, quote/unquote, investors. I don't think I heard a  
16 word about the duty to the creditors and to the estate. And I  
17 think it's important when thinking about the investors that Mr.  
18 Pomerantz keeps referring to, the Committee is not talking  
19 about the legitimate third party investors, the CalPERS. The  
20 Committee is talking about the very people that were in charge  
21 of this debtor while breaches of fiduciary duty were rampant  
22 and their related entities that resulted in the filing of this  
23 bankruptcy case.

24 And I find it a little bit rich, Your Honor, that  
25 their debtor is using the duty to investors to include third

1 parties to try and come in here and passionately argue that  
2 distribution should be made at this time to these insider  
3 parties without a word at all about why it may actually be in  
4 the creditors' best interest or this estate's best interest to  
5 not make those distributions at this time. So those were a  
6 couple of comments that struck me as I was listening to what  
7 Mr. Pomerantz said.

8 But let me be clear, Your Honor, as Your Honor is  
9 aware the debtor is in bankruptcy because of the documented and  
10 egregious breaches of fiduciary duties and contractual  
11 obligations to its creditors and its propensity for fraudulent  
12 and litigious conduct as documented. Mr. Dondero and until  
13 recently Mr. Okada dominated all aspects of the debtor and  
14 controlled all of its decision-making, including the decision-  
15 making that led various tribunals, including this Court, to  
16 conclude that the debtor had breached its fiduciary duty,  
17 engaged in fraudulent conduct, and employed persons who are not  
18 credible and not truthful.

19 Against this backdrop, Your Honor, the debtor wants  
20 to make distributions to investors, again, the investors we're  
21 talking about here are Mr. Okada, and entities owned and/or  
22 controlled by Mr. Dondero and Mr. Okada without regard  
23 apparently because I didn't hear anything about that to the  
24 interest of creditors under the rubric of a fiduciary duty that  
25 is supposedly owed to those insider parties, the same insider

1 parties, Your Honor, who were found to have breached the duties  
2 to the creditors of this estate or to the investors which then  
3 resulted in them becoming creditors of this estate and led to  
4 the bankruptcy.

5           Your Honor, I think the irony is fairly thick, and I  
6 don't think the Court should allow the distributions at this  
7 time. These insider parties, and I'm glad Mr. Pomerantz  
8 mentioned it to you because their papers did not mention the  
9 notes that were owed, they owe the debtor millions of dollars.  
10 The numbers that Your Honor read are just the direct notes  
11 among those parties. They do not include the notes that are  
12 owed by, for example, affiliated entities of Mr. Dondero. So  
13 those numbers are even larger than what Mr. Pomerantz suggested  
14 to Your Honor.

15           Second, as the debtors do finally disclose in their  
16 papers, the insider parties receive certain of the insider  
17 interests from the debtor pursuant to transactions that were  
18 only recently disclosed to the Committee and not have been  
19 examined by the Committee. So in many of the circumstances,  
20 the very interests that are giving rise to the basis for these  
21 distributions once belonged to the debtor.

22           Third, obviously, the insider parties are the focus  
23 of the Committee's ongoing investigation of the estate causes  
24 of action, and that's entirely appropriate given the long  
25 history and the findings made by this Court and others

1 regarding the behavior of this debtor prior to the bankruptcy.

2           Your Honor, instead of allowing the distributions to  
3 be made, the Court should direct that the distributions that  
4 the debtor seeks to make to the insider parties to be placed  
5 into a segregated interest-bearing account pending the  
6 resolution of potential claims against the insider parties  
7 including the collection of notes owed by the insider parties  
8 and the investigation into the validity of the insider  
9 interests.

10           If the insider parties have an issue with this,  
11 obviously, they can come before Your Honor, perhaps they'll  
12 come before Your Honor today, and explain to you why what is  
13 being proposed is unfair to them or why despite the  
14 circumstances surrounding this case, the rampant breaches of  
15 fiduciary duty, the questionable transactions, and the  
16 existence of the notes they owe the debtor they should receive  
17 those distributions now. And we can do that after a fulsome  
18 discovery of those parties, a fulsome record, full opportunity  
19 to brief.

20           I believe, the Committee believes this is a very  
21 sensible proposal, and it would seem to serve all interests.  
22 The interests of the estate would be protected. Let's talk  
23 about those. Obviously, we're more likely to recover on the  
24 notes and any potential claims, including claims that the  
25 insider interests were inappropriately obtained.

1 Mr. Pomerantz referred to the word "leverage."  
2 Again, it's the estate, the estate should be thinking about how  
3 it can actually collect on its claims and notes. So the word  
4 "leverage" I don't think is appropriate here. It just seems  
5 sensible. The interest of the insider parties would also be  
6 protected. The money will be placed in a segregated account,  
7 and the status quo would be preserved. And legitimate third  
8 party investors, we are all fully in support of the legitimate  
9 third party investors receiving their distributions. We've  
10 never had an issue with that, Your Honor.

11 Mr. Pomerantz referred to the authority, Section 105.  
12 I do believe the Court has ample authority under Section 105 of  
13 the Bankruptcy Code to order the relief requested by the  
14 Committee. Obviously, Section 105 is broad and, as we'll  
15 discuss further later, it's been interpreted by this Court and  
16 other courts to apply very broadly and in circumstances similar  
17 to this.

18 Additionally, Your Honor, although I do not believe  
19 105 needs to be tethered, I believe is the word that was used,  
20 to other sections of the Code. I do believe that other  
21 sections of the Code are implicated as the relief the Committee  
22 requests impacts property of the estate which includes the  
23 notes and potential claims against the insider parties as well  
24 as the rights and obligations of the debtor under the various  
25 contracts that Mr. Pomerantz referred to.

1           So, we have 105. If we need to tether it to  
2 something, we can tether it to 541 and we can tether it to 363.  
3 What we're asking the Court to do impacts property of the  
4 estate, impacts the rights and obligations of the debtor.

5           Finally, Your Honor, there was a long discussion or  
6 somewhat of a discussion about the fact that the Committee has  
7 not sought a preliminary injunction or has not filed claims  
8 against the insider parties. First, again, I believe Section  
9 105 gives the Court the authority that it needs to provide the  
10 relief. Second, the Court has the flexibility should it choose  
11 to construe or find it necessary to construe our objection as a  
12 request for a preliminary injunction and the request satisfies  
13 that standard.

14           Third, Your Honor, this has been an expedited process  
15 initiated by the debtor. If this Court believes that other or  
16 further proceedings or processes are necessary or appropriate,  
17 the Court should allow the parties the time for that. We  
18 agreed to an expedited motion practice under the protocols.  
19 That's a fact. The protocols cover a variety of circumstances  
20 designed with the exigencies of the debtor's business in mind,  
21 not designed with trying to speed distributions to Dondero,  
22 Okada, and the insider parties. There simply is no exigencies  
23 surrounding that, and the Committee should not be prejudiced if  
24 this Court believes a further or other procedural vehicle is  
25 necessary.

1           And a moment, Your Honor, on the investigation, as  
2 Your Honor is aware the insider parties have dominated the  
3 debtor for years. Only recently January 9th the Committee has  
4 gotten the ability to investigate. And to date, we've been  
5 doing that. I do dispute what Mr. Pomerantz said about the  
6 debtor's cooperation. I believe that they've used words to  
7 that effect but we've not gotten the documents that we need.  
8 This is a complicated enterprise as Your Honor is aware. It's  
9 unrealistic to think that we would be in a position to bring  
10 claims against insider parties at this particular time in the  
11 case. And we cannot be prejudiced by saying we should have  
12 completed our investigation and had brought claims every time  
13 the debtor thinks it should make a distribution to Mr. Dondero  
14 or one of its related entities.

15           And so, Your Honor, to sum up, we think that the most  
16 logical solution here and frankly the one that I assume the  
17 debtor would have agreed with me on would be to come to this  
18 Court, allow the distributions to be made to all the third  
19 party investors, to withhold the distributions to the related  
20 parties while the investigation occurs, while the notes are  
21 settled, and while the Committee determines and the Court may  
22 perhaps ultimately determine whether the interest that gave  
23 rise to those distributions were in fact appropriately with  
24 those parties.

25           Instead, we're here talking about duties owed to,



1 quote/unquote, the investors without considering what it is  
2 that's owed to these creditors and to this estate. And with  
3 that, Your Honor, we would ask that the motion be denied or  
4 however you'd look at it but that the relief we noticed in our  
5 paper be ordered by Your Honor.

6 THE COURT: Let me follow up and make sure I  
7 understand a couple of things. You've said a couple of times  
8 that it's just the distributions that would go to related  
9 investors, Mark Okada, CLO Holdco, HCM Services. And I got the  
10 impression from your pleadings as well as your oral statements  
11 that the Committee is not challenging in any way the decision  
12 to wind down these three funds, if you will. You know, my  
13 reading of the pleadings was November 2019, you know, less than  
14 a month after the bankruptcy was filed or about a month after  
15 the bankruptcy was filed, you know, there were significant  
16 redemptions. In the face of significant redemptions, the  
17 debtor decided it was appropriate to wind these down.

18 Is that going to be the subject of evidence and  
19 testimony today? Is the Committee at all concerned about how  
20 that all played out, whether it was legitimate unaffiliated  
21 investors seeking redemption or if it was by chance insider  
22 investors?

23 MR. CLEMENTE: No, Your Honor. The Committee is not  
24 challenging the wind-down as I believe you're referring to. We  
25 are not doing that, Your Honor.

35

1 THE COURT: Okay. And this may be one instance where  
2 it's kind of hard for me to separate what happened in the  
3 related case of Acis versus this where we had all of a sudden  
4 we don't want Acis to, you know, manage these in that case CLOs  
5 anymore until redemptions were happening.

6 MR. CLEMENTE: I understand, Your Honor.

7 THE COURT: And the business judgment of that --  
8 well, it's complicated, right.

9 MR. CLEMENTE: I completely understand.

10 THE COURT: It was, in the end of the day, depriving  
11 Acis debtor of management fees. Same thing is happening here,  
12 right? Highland is being deprived of management fees by the  
13 wind-down of these three funds, but you're not challenging the  
14 business judgment of the --

15 MR. CLEMENTE: That is correct, Your Honor.

16 THE COURT: -- whole process of the redemptions  
17 period?

18 MR. CLEMENTE: That is correct, Your Honor.

19 THE COURT: Okay.

20 MR. CLEMENTE: There is a pot of funds sitting in  
21 those funds, and there is a pot of funds sitting in RCP --

22 THE COURT: It was a legitimate non-affiliated  
23 entity's --

24 MR. CLEMENTE: We're not challenging it, Your Honor.

25 THE COURT: Okay.

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1 MR. CLEMENTE: What we are challenging obviously is  
2 now the distribution of those funds to the related entities.  
3 That's where we take issue with it at this particular moment in  
4 time.

5 THE COURT: Okay.

6 All right. Who else wishes to make an opening  
7 statement? I know Acis had a joinder or a slightly different  
8 objection, I think.

9 MS. PATEL: Yes, Your Honor. Good afternoon.  
10 Again, Rakhee Patel on behalf of Acis. And I'll address Your  
11 Honor's question first. Acis has concerns about the wind-down  
12 of these funds. I'll just clear with respect to it. And Your  
13 Honor referenced, you know, perhaps we need to separate what  
14 happened in the Acis case and whether that's happening here or  
15 not.

16 Your Honor, I'm not sure from Acis's perspective that  
17 we don't object to the wind-down of these funds. We just  
18 frankly don't have enough information to kind of take a  
19 position with respect to that whether these funds should be  
20 wound down. But the fact of the matter is is in the lead-in  
21 into this motion -- and this is sort of the source and subject  
22 of Acis's additional objection and not just plain vanilla  
23 joinder and with the Committee -- is is that the transactions  
24 happened. The sale of the stock has happened. So whether it's  
25 in connection with the wind-down of the funds or whether it's

1 just a sale, it's happened now.

2           So I'm not sure that we can unring that bell, but  
3 Acis's whole point and as we sort of set out in our joinder and  
4 our separate comment or objection was, Your Honor, the light of  
5 day needs to be cast on this transaction as a whole and we need  
6 to be talking about it that the transaction needs to be  
7 discussed here in open court. And, frankly, the entire  
8 creditor body needs to have and the Court needs to have  
9 transparency with respect to that.

10           So to that point, Your Honor, the debtor filed the  
11 motion to approve the distributions of the proceeds from the  
12 sale in accordance with the procedures approved as part of the  
13 broader settlement motion that Your Honor heard in January.  
14 Now the debtor incredibly takes the position that this Court  
15 and the creditors are effectively powerless to stop these  
16 distributions. And here's the problems with that position.

17           First, from a technical legal perspective, the debtor  
18 ignores the language of Section 363. Frankly, it's easy to  
19 have a strong initial knee-jerk reaction that Section 363  
20 doesn't apply here because there's no sale of property to the  
21 estate. The MGM stock was held down in a different entity.  
22 Your Honor, frankly, I did it myself. But when you analyze the  
23 language of Section 363, it also prescribes the use of property  
24 of the estate outside of the ordinary course of business. And  
25 here, the use of property of the estate is the debtor's

1 valuable management rights of the various entities, so Dynamic,  
2 AROF or AROF or NRCP.

3 And let's just assume for argument's sake that the  
4 debtor's statement is correct and enforceable and there's no  
5 problem with it that the funds are in liquidation. No one can  
6 rationally argue that that liquidation of a fund or a manager's  
7 actions in liquidating said fund are ordinary course. So there  
8 is sort of the Section 363 hook for lack of a better term.

9 Second, from an equity perspective, it is wholly  
10 inequitable for the debtor in an attempt to derail the Court  
11 and the creditors from inserting a Chapter 11 trustee -- and  
12 recall, Your Honor, that this case was filed on October 16th of  
13 2019 where the debtor filed to seek protection from the  
14 imminent within minutes if not hours of entry of \$189 million  
15 judgment against the debtor. And it's really frankly, and as  
16 Mr. Pomerantz acknowledged, the product of failed -- numerous  
17 other failed litigation strategies. Acis, UBS, Pat Daugherty,  
18 quickly all -- and all of those the pieces of litigation  
19 quickly coming home to roost.

20 Acis was clear right out of the gate, Your Honor, at  
21 the first day hearings held on October the 18th, 2019 that it  
22 would seek the appointment of a trustee. And in an attempt to  
23 sort of take itself out of a trustee potentially being  
24 appointed or, you know, as to forestall that happening, the  
25 debtor filed an ordinary course protocol motion. And this is

1 in October of 2019. And as a part of that ordinary course  
2 protocol motion, the proposal was that Mr. Sharp, the CRO of  
3 the debtor, be appointed the CRO of the debtor and that he  
4 would be the gatekeeper, he would be in charge of all related  
5 party transactions, and he would oversee all of those  
6 transactions.

7 And, Your Honor, indeed Mr. Sharp testified that he  
8 was the gatekeeper. He was the guy in charge, and that was on  
9 I want to say like November 20th of 2019. And commensurately,  
10 Mr. Waterhouse, the CFO for Highland Capital Management, also  
11 testified and Mr. Waterhouse was the first day declarant for  
12 Highland as well. He testified that everyone understood that  
13 Mr. Sharp was to be the gatekeeper. And, indeed, Mr. Sharp  
14 would -- they had training at Highland Capital Management to  
15 the effect that all employees knew if you've got a related  
16 party transaction, it's got to go through Brad Sharp.

17 So in an attempt to sort of derail Acis from getting  
18 a trustee appointed, they affirmatively sought out these  
19 protocols and ultimately agreed to protocols that look similar,  
20 not exactly but similar to those proposed ordinary course  
21 protocols. And the protocols that ultimately were approved  
22 required court approval. And now we've got them coming back  
23 and saying, ha ha, just kidding, no one can do anything about  
24 it anyway and we have to make these distributions because we've  
25 got a fiduciary duty to do it.

1           On that note, the debtor who should be fully  
2 transparent during this process while it seeks the benefit of  
3 bankruptcy including the automatic stay, argues in its reply  
4 brief filed this morning at Footnote 9 that the underlying sale  
5 transaction in excess of \$123.25 million is sacrosanct and  
6 irrelevant because the Committee blessed it. Acis objected,  
7 Your Honor. When that transaction was presented to the  
8 Committee, Acis objected.

9           First, it would have its cake and eat it, too. It  
10 can't take advantage of the protocols it likes while at the  
11 same time stiff-arming those that are inconvenient to it. It  
12 can't say the transaction's good because the Committee blessed  
13 it, but the Committee didn't bless the distributions to the  
14 insiders and, oh well, you can't do anything about that anyway.

15           Second, the broader transaction is violative of at a  
16 minimum traditional notions of transparency in bankruptcy and  
17 likely 363 along with what the debtor's fiduciary duties to its  
18 creditors. As Mr. Clemente pointed out, the debtor has dueling  
19 fiduciary duties, and we didn't hear nearly a word with respect  
20 to the debtor's fiduciary duties to its creditors. And, Your  
21 Honor, we're not looking to generally micromanage what this  
22 debtor is doing, but this transaction is fundamentally flawed  
23 and at a minimum has red flags all over it.

24           As we now know from the CalPERS objection, Mr.  
25 Dondero entered into a transaction with Highland Capital

1 Management buying CalPERS' interest and likely others'  
2 interests at June 30 prices or by giving over a set number of  
3 MGM shares to CalPERS. That's the agreement that's attached to  
4 the CalPERS objection. The agreement was always a win-win for  
5 Highland Capital Management because it could either make money  
6 on the arbitrage of the stock -- it bought it at a particular  
7 price, and if it's ordered at a different price, you got to  
8 keep the differential -- or give over the stock if the stock be  
9 valued and priced. Win-win.

10 He then immediately the very next day fraudulently  
11 transferred that agreement from Highland Capital Management to  
12 Highland Capital Management Services, an entity in which he is  
13 the 75-percent owner and Mr. Okada is the 25-percent owner.  
14 That is 15 days before filing this Chapter 11 bankruptcy case.  
15 The only purported consideration for the transfer, and I think  
16 this is Exhibit B, to the CalPERS objection, was an indemnity  
17 by Highland Capital Management Services. That's the only  
18 consideration that was transferred as a part of that  
19 transaction, Your Honor.

20 Then when the stock price rises in November, he seeks  
21 committee approval for a transaction that still benefits  
22 Highland Capital Management Services. Despite not having a  
23 Committee response, he enters into a rogue unauthorized trade  
24 of MGM stock on whose board he serves on and is thus privy to  
25 information, violative of the very protocols that the debtor



1 was pressing so strenuously to avoid the appointment of a  
2 trustee. Indeed, Brad Sharp testified the day before the rogue  
3 trade that this exact type of transaction had to go through  
4 him. And Mr. Waterhouse's testimony came right after that to  
5 indicate that everybody at the debtor knew that Mr. Sharp had  
6 to approve it.

7           Ultimately, the Committee rejected that transaction  
8 in November, but the trade was already done. If Mr. Dondero  
9 had his way, Highland Capital Management Services would have  
10 benefitted from the transaction. Frankly, every one of these  
11 transactions needs the light of day shed upon them here in  
12 court to determine what is in the best interest of creditors.  
13 The debtor's attempt to cloak itself in the Committee's non-  
14 objection, and I want to be clear on this, it was a non-  
15 objection. I think reference was made that the Committee  
16 agreed to the sale of the MGM stock. That's not what happened.  
17 The Committee just did not object to the transaction which can  
18 likely best be characterized frankly as everyone plugging their  
19 nose while simultaneously telling this Court it can't do  
20 anything about the proceeds is the exact reason why the Court  
21 should be inquiring into the transaction in the first place.

22           And not so incidentally, that stock that Mr. Dondero  
23 traded without authority in November is trading approximately  
24 20 percent higher today, around the low 90s.

25           THE COURT: All right. Thank you.

1 Thank you. All right.

2 Do we have any other opening statements? I'm  
3 probably going to have to take a break before we do evidence  
4 and hear my 2:30 matter, which I don't think is going to take  
5 very long, at all.

6 All right. Judge Lynn.

7 MR. LYNN: Your Honor, thank you.

8 We're not opposed to the motion, and we understand  
9 the concerns expressed both by the debtor, the debtor's  
10 independent board, which feels that it's compelled to make the  
11 distribution to insiders. And while we don't necessarily agree  
12 with them, we understand the Creditors Committee's concerns as  
13 well.

14 We'd like to suggest the following should the Court  
15 determine that the motion should be denied. And that is that  
16 instead of the debtor retaining the funds, that the debtor  
17 distribute the funds into the registry of the Court. That way,  
18 they lose control over the funds and they can say that they've  
19 distributed them in accordance with their agreements and  
20 applicable law.

21 The funds would remain there until either a recipient  
22 or prospective recipient posts a bond or other suitable  
23 collateral or the Creditors Committee agrees to the  
24 distribution to the insider or there is a Court entered for  
25 another reason after a showing made before Your Honor. The

1 debtor and the Creditors Committee would, of course, retain all  
2 rights to seek the funds they would have had, which rights they  
3 would have had immediately before the distribution to the  
4 registry, plus any rights that would be gained by reason of the  
5 distribution itself.

6           The debtor thus distributes, the Creditors Committee  
7 retains its rights, the Court retains control, and this can all  
8 be done, we believe, by a Court order and we hope this may give  
9 the Court a suitable alternative.

10           THE COURT: Okay. Let me make sure I understand.  
11 You said, if the Court is inclined to deny the motion. Are you  
12 offering, I guess Mr. Dondero's proposal that -- I mean, these  
13 aren't disbursements that would all go to him, they would --  
14 some would go to Okada, and -- who's not objected or appeared.  
15 But -- let me cut to the chase.

16           Are you trying to avoid a hearing and evidence  
17 altogether by saying, you know, these related entities agree  
18 their distributions will go into the registry of the Court  
19 right now?

20           MR. LYNN: Mr. Dondero supports this position. We do  
21 not speak for Mr. Okada.

22           THE COURT: Right.

23           MR. LYNN: I understand that more than one of the  
24 entities -- and Your Honor must forgive me. We're relatively  
25 new to this case.

1 THE COURT: Yeah. One is Holdco, and that is  
2 technically a DAF, a charitable entity that --

3 MR. LYNN: Yes. I believe that's so, and I  
4 understand there may have been communications between the  
5 independent board and the trustee of a DAF, but I was not a  
6 party to those communications. I'm just trying to give the  
7 Court an alternative -- Mr. Dondero is doing so -- that might  
8 be acceptable to the debtor and at the same time would  
9 accomplish what the Creditors Committee wants, which is to  
10 retain control of the funds.

11 I must say, Your Honor, that having been there  
12 myself, I have a great deal more confidence in the registry of  
13 the Court protecting funds than I do in just about anyone else.

14 THE COURT: All right. Well, that would certainly  
15 seem to give the Committee everything it's asking for, and --

16 MR. POMERANTZ: Your Honor, if I may interrupt.

17 I understand from members of the debtor's independent  
18 board who have spoken to Grant Scott, who is the principal in  
19 charge of CLO Holdco, that CLO Holdco would also support the  
20 proposal that has just been made by Judge Lynn. We do not have  
21 the agreement of Mr. Okada to support that proposal.

22 THE COURT: Okay. Although, he has not weighed in  
23 with any sort of -- well, I don't know. How do we feel about  
24 Mr. Okada's interest here? I mean, he's obviously been given  
25 notice of all of that, and --

1 MR. POMERANTZ: Well, actually we asked him --

2 THE COURT: Okay.

3 MR. POMERANTZ: -- when we heard last night that this  
4 might be a possibility. He has rejected that. And in light of  
5 his rejection of that proposal, we as the debtor feel we need  
6 to proceed with the motion. I would think it substantially  
7 narrows the issues that are going to be in evidence, all the  
8 stuff we've heard about MGM Trade, which may at some point in  
9 time be something that people don't testify from the podium and  
10 that actually the subject of real evidence. But with respect  
11 to Mr. Okada, we will have to go forward with the motion.

12 MR. LYNN: Yeah, so let me express that at this  
13 point, Mr. Dondero is of course not supporting the Acis  
14 suggestion that a trustee should be appointed. We did not  
15 understand that this hearing would address that issue.

16 THE COURT: Yeah. I'm not sure. That's what they  
17 were suggesting today. I think they were just saying at one  
18 point, they adamantly wanted a trustee, and these protocols  
19 alleviated their concerns and caused them to back off. And  
20 now, they're upset that, you know, the debtor is resisting the  
21 protocols in a way. So -- all right.

22 Mr. Clemente, what say you? I --

23 MR. CLEMENTE: Your Honor, I --

24 MR. LYNN: Thank you, Your Honor.

25 THE COURT: Thank you.

1 MR. CLEMENTE: -- I think you can tell from our  
2 papers, this is effectively what we asked for.

3 THE COURT: Right.

4 MR. CLEMENTE: I don't even know why it took us to  
5 get to this point for that. It seemed so obvious to me. But  
6 when it was articulated by the former Judge here, it -- I think  
7 it just held more -- maybe it made more sense.

8 As far as Mr. Okada's concerned, I think Your Honor  
9 could clearly deposit the funds in the registry of the Court,  
10 and he's free to come in. I think that's what Counsel for  
11 Mr. Dondero was actually suggesting. So I'm not sure that  
12 anything is required further with respect to Mr. Okada, unless  
13 he has a representative here that would like to raise something  
14 with Your Honor. So, to me, on behalf of the Committee, I  
15 think that accomplishes what the Committee was trying to do  
16 with its objection.

17 THE COURT: All right.

18 Anyone else wish to be heard? Ms. Shriro, I know  
19 that you filed something for CalPERS, but obviously, your  
20 client is an unaffiliated investor in the private equity fund,  
21 RCP. You just want to get paid.

22 MS. SHRIRO: That's correct. We just want to get  
23 paid, and I would defer to my co-counsel on the phone. If he  
24 has any comments, this would be the time to raise them.

25 THE COURT: All right.

1 Co-Counsel on the phone, I think it's Mr. Cisz. Is  
2 that correct?

3 MS. SHRIRO: Yes.

4 THE COURT: Okay. Anything you want to say about  
5 what's (indiscernible)?

6 MR. CISZ: That's correct, Your Honor. This is Louis  
7 Cisz on behalf of CalPERS, and Ms. Shriro is correct. So long  
8 as CalPERS receives its distribution relative to the sale of  
9 the MGM stock, CalPERS otherwise doesn't take a position with  
10 respect to the motion.

11 THE COURT: Okay. Thank you.

12 All right. Well, turning to the literal terms of the  
13 motion, the relief the motion sought was simply an order  
14 authorizing distribution of the cash from these wind-downs of  
15 the three funds to insider investors. And so we have the  
16 Committee objection, we have the Acis objection, we have  
17 Dondero's counsel here appearing. I think I can, given this  
18 request for relief and the opposition of the Committee, as well  
19 as one of the Committee members, Acis, and due to these  
20 representations of Dondero's counsel and the board, I can order  
21 that the money that would otherwise go to insider investors --  
22 I think it's roughly about 8.6 million -- will, instead of  
23 going to the insider investors, will go into the registry of  
24 the Court with reservation of everyone's rights later to file  
25 motions requesting that it be disbursed to them. So everyone

1 understands, this is just kind of a holding place for the funds  
2 right now.

3 MR. POMERANTZ: Your Honor, we do not have  
4 Mr. Okada's representation and the debtor is not modifying its  
5 motion. The debtor would like to proceed with respect to  
6 Mr. Okada. We asked him, he did not want to agree to the same  
7 things that would be in consideration by CLO Holdco, and for  
8 the reasons we've identified in the motion and I've expressed  
9 to Your Honor, we feel we have the obligation, we have the duty  
10 to proceed, and we would request the opportunity to put on  
11 evidence so you can hear from Mr. Seery and ultimately make a  
12 determination whether the Committee and Acis have laid out a  
13 legitimate basis for use of 105. I'll reserve my comments and  
14 their comments until the end.

15 But we would want to proceed in that limited matter  
16 because we don't have all agreements of the parties and the  
17 same reasons stand for why we filed the motion to proceed with  
18 the distribution for Mr. Okada.

19 THE COURT: Okay. Well, I guess I misinterpreted  
20 everything that I thought was going on out there. Mr. Okada, I  
21 guess, you said is owed 4.176 million from the Dynamic Hedge  
22 Fund, and then -- I don't know if that was the total amount  
23 from the three funds, but you feel like you have a fiduciary  
24 duty to pursue that disbursement.

25 MR. POMERANTZ: Absolutely, Your Honor.



1 THE COURT: All right.

2 MR. POMERANTZ: And again, you know, we could get  
3 this into argument. Mr. Okada is in a much different position  
4 than some of the other insiders. We understand the comments  
5 about Mr. --

6 THE COURT: Well, I remember some of the dynamics  
7 here, but let me tell you what I'm going to feel the need to  
8 get into if we hear evidence. And what we'll do is we're going  
9 to take a short break in a minute. Let me ask the Barker  
10 people who I think are in the back.

11 (Off record discussion 2:34:51 to 2:35:01)

12 THE COURT: Okay. So we'll take a 10-minute break in  
13 a minute.

14 But again, one reason I was sort of delighted to get  
15 the suggestion of Judge Lynn is I see this evidentiary hearing  
16 as being a little more involved than looking at contractual  
17 obligations and whatnot, and you know, the fact that these are  
18 non-property of the estate funds that we're talking about. I  
19 have fundamental questions having read the pleadings about the  
20 decision to wind-down these funds that was made in November  
21 2019, days after Highland filed bankruptcy.

22 Who made the decision? Was it insider investors  
23 seeking redemption? Or was it, you know, did we have large  
24 unaffiliated investors exercising redemptions, and so  
25 therefore, it was reasonable business judgment, you know, we

1 need to wind down?

2 I know the issues are a little bit different with the  
3 two hedge funds versus the RCP fund that had the term. And I  
4 understand, I read the pleadings, how the term expired in April  
5 2018, it was extended for one year, and then the advisory board  
6 didn't consent to an additional extension.

7 Again, maybe the new board has thoroughly scrubbed  
8 this and you're going to tell me that in evidence. And maybe  
9 the Committee has thoroughly scrubbed this, and you're going to  
10 tell me that with evidence. But I -- I'll want to hear that.  
11 I'll want to hear that this was all legitimate, independent,  
12 non-affiliated investors pressing for the wind-down of these  
13 funds, and we didn't have what I refer to as the Acis situation  
14 where -- well --

15 MR. POMERANTZ: Your Honor, Mr. Seery is prepared to  
16 testify to each of those. And as I mentioned, the board did  
17 thoroughly consider it and you will -- Your Honor will hear  
18 evidence that led Mr. Seery and the board to conclude that each  
19 of these were appropriate. But we intended to get into that in  
20 the evidence.

21 THE COURT: Okay.

22 (Proceedings recessed from 2:37 p.m. to 3:01 p.m.)

23 THE COURT: All right. We're going back on the  
24 record in Highland. Mr. Pomerantz, are you ready to call your  
25 witness?

1 MR. CLEMENTE: Your Honor, if I might before.

2 THE COURT: Mr. Clemente?

3 MR. CLEMENTE: Matt Clemente on behalf of the  
4 Committee, again.

5 I would just like to revisit the colloquy we had  
6 before we broke.

7 THE COURT: Okay.

8 MR. CLEMENTE: I'm still confused as to why Your  
9 Honor just can't enter or so order that the debtor has  
10 satisfied its duty upon depositing the money into the Court  
11 registry. And we don't need to have any of this this  
12 afternoon. I see it as similar to the Foley hearing where Your  
13 Honor expressed some frustration. It's kind of maybe not the  
14 best use of time. I'm not sure what exactly we're trying to  
15 accomplish here.

16 If the debtor's concerned about its duty to a  
17 constituent who is not present in Court today, I think Your  
18 Honor can deal with that by entering an order that says, you  
19 know, based on the pleadings and the record so far, the debtor  
20 has satisfied its duty and placed the money in the Court  
21 registry.

22 And if Mr. Okada has an issue with that, he can come  
23 back before Your Honor. I'm just not quite sure what the point  
24 is here, Your Honor.

25 THE COURT: All right. Well, let's turn back to

1 Mr. Pomerantz, and let's talk about what my, I guess, unrefuted  
2 evidence is. I have -- Mr. Okada would be due for the Dynamic  
3 Hedge Fund, 4.176 million is what I read in the pleadings where  
4 you told me.

5 And then, I don't know that I have written down what  
6 he would be owed from either the Argentina Fund or the RCP  
7 Fund. Anything?

8 MR. POMERANTZ: Zero.

9 THE COURT: Zero. So we're talking about the 4.176  
10 from termination of the Dynamic Fund.

11 MR. POMERANTZ: Right.

12 THE COURT: Meanwhile, we know there is a \$1.3  
13 million demand note --

14 MR. POMERANTZ: Correct.

15 THE COURT: -- owing to Highland from Okada. And I  
16 feel like I heard that there was more, but that's the only --

17 MR. POMERANTZ: That is the only note from Mr. Okada.

18 Your Honor, I think part of it is I stood up and gave  
19 a lengthy presentation, and I told Your Honor what the  
20 testimony would show. Now there's been a lot of issues in this  
21 case about what the board's doing, what it's not doing. Part  
22 of our reason for being here today and part of my presentation  
23 was to get Your Honor comfortable with how the board is  
24 handling its duties. I didn't want you to hear that just from  
25 me. I wanted you to hear that from Mr. Seery.

1           There also have been allegations by Acis and concerns  
2 Your Honor has raised as to what went into the wind-down of  
3 these funds, given Your Honor's past experience with Acis. And  
4 I'm sure Ms. Patel's past experience with Acis.

5           I think it's important to hear from Mr. Seery because  
6 he has good explanations of why each of these funds are in  
7 wind-down. And then, furthermore, look, Your Honor will decide  
8 what Your Honor decides and whether the Committee and Acis have  
9 met the showing under 105 to hold back the Okada funds. If  
10 Your Honor decides that, of course we will abide by that  
11 decision.

12           But we didn't want any implication that we were sort  
13 of laying down for that issue. So I think it would be helpful  
14 maybe to hear some testimony from Mr. Seery. If Your Honor  
15 then concludes that funds shouldn't be disbursed, Your Honor  
16 will conclude that funds shouldn't be disbursed. I don't think  
17 this has to be very lengthy. I think we've -- we've narrowed  
18 the issues, given that we don't have an issue with respect to  
19 RCP anymore. We don't have the issue with HCM Services  
20 receiving money on account of a trade that Acis is very  
21 critical about. Again, those issues at an appropriate time can  
22 be raised in appropriate form, and Your Honor will have a full  
23 evidentiary hearing, as opposed to a tail wagging the dog on  
24 this motion when it's not even relevant anymore.

25           So what I would propose is that we allow Mr. Seery to

55

1 take the stand. We allow him to address Your Honor's concerns.  
2 We allow him to testify to the things that I said he would  
3 testify to so it gives Your Honor some comfort, and hopefully  
4 the other parties comfort, exactly how Mr. Seery and the other  
5 board members are performing their duties.

6 THE COURT: Okay. Can we all agree to some  
7 reasonable time limitations here? I'm thinking we're done in  
8 an hour. Maximum 30 minute direct of debtor, or redirect, and  
9 maximum 30 minute cross of all objectors. Can we do that  
10 today?

11 MR. POMERANTZ: I think we can do that, Your Honor.

12 THE COURT: Okay. Then that's --

13 MR. CLEMENTE: My only question, Your Honor -- Matt  
14 Clemente on behalf of the Committee -- is what are we still  
15 talking about here? Are we just talking about the distribution  
16 to Mr. Okada? And the other distributions are off the table as  
17 suggested by -- or as agreed to at least on behalf of  
18 Mr. Dondero? I don't even know what we're talking about.

19 MR. POMERANTZ: That is correct, Your Honor. It's  
20 only the distributions to Mr. Okada.

21 THE COURT: Although, I think he wanted the Court to  
22 get some testimony from Mr. Seery about sort of the business  
23 judgment of the three wind-downs, but I don't think that's  
24 going to --

25 MR. POMERANTZ: That shouldn't take a long time.

1 THE COURT: -- be a probe today of MGM stock sales.

2 MR. POMERANTZ: No, it won't be at all, Your Honor.

3 And again, look, we understand Your Honor has had experience  
4 with Acis, and we understand the concerns, Your Honor, coming  
5 in, seeing redemptions, and the questions you asked.

6 Again, it's important for the debtor to be able to  
7 demonstrate to Your Honor that this board is doing its  
8 appropriate things and hearing from Mr. Seery why he made these  
9 decisions so Your Honor can get comfortable, not only in these  
10 matters, but in other matters that brought before Your Honor in  
11 the future that this board is doing exactly what they should be  
12 doing acting as an independent fiduciary.

13 That's why I think some of our testimony, but we're  
14 happy to live within the time frame that Your Honor has given  
15 us.

16 THE COURT: Okay. All right. Thank you.

17 MS. PATEL: Your Honor, I just wanted to follow along  
18 with one of the comments that I made during my opening  
19 statement and hopefully, it will help further narrow the issues  
20 and keep us within the time limits, is is that when -- in  
21 responding to Your Honor's question about the wind-down of  
22 these funds, and I said Acis had concerns, I want to say we've  
23 got concerns with respect to the Argentina and the Dynamic  
24 fund. We frankly just don't understand or have that much  
25 information with which to really evaluate the transaction, so

1 we're a little hamstrung today for purposes of cross-  
2 examination because that's not something that necessarily Acis  
3 has inquired into.

4 But separate and apart from that, just again so  
5 everyone's clear, with respect to the wind-down of RCP, Acis  
6 does not take issue with respect to the genesis of the wind-  
7 down. So the decision to wind it down is a find from Acis's  
8 perspective that should probably have been wound down. Now,  
9 the methodology of how it's being wound-down, that's fair game.

10 THE COURT: I don't know what that meant --

11 MS. PATEL: Okay.

12 (Laughter)

13 THE COURT: -- the methodology of how it's being  
14 wound-down.

15 MS. PATEL: Okay. Let me --

16 THE COURT: Very quickly because, you know --

17 MS. PATEL: Yes. Your Honor, what I meant by that  
18 was, in terms of the decision to wind-down RCP, that makes  
19 sense to Acis because it is a fund that should have been wound-  
20 down. How it is going about being wound-down, that is open for  
21 dispute, and one of those things being here this MGM stock  
22 sale, etcetera.

23 THE COURT: We'll hear from Mr. Seery. I thought  
24 there was a pile of cash at this point, but maybe I misread the  
25 pleadings.



1 Okay.

2 MR. POMERANTZ: Your Honor, let's remember what this  
3 motion is. This motion wasn't a referendum on wind-down, it  
4 was the ability to make a distribution.

5 THE COURT: Right.

6 MR. POMERANTZ: Mr. Dondero's counsel, who is  
7 speaking on behalf of ACM Services, said they're prepared to  
8 hold those distributions in the registry of the Court. The  
9 issues regarding what Ms. Patel testified from the podium, at  
10 some point, they may very well be the subject of a hearing in  
11 the Court. We're happy to continue responding to the Committee  
12 and Ms. Patel's comments and questions about how, but it's just  
13 not relevant here.

14 And, Your Honor, there is no way if Ms. Patel is  
15 going to go down that road that we will ever be here only an  
16 hour. That is a much longer discussion.

17 THE COURT: And let me just clarify where I was  
18 coming from.

19 I thought if we were evaluating whether insiders  
20 should get \$8.6 million of distributions, the bona fides of the  
21 decision to go into wind-down mode needed to be explored a  
22 little bit and see if some of these insiders were improperly  
23 exercising control in that.

24 So I agree with what you're saying. Now, that we're  
25 just talking about deferring to another day all but maybe

1 Mr. Okada's disbursement, we don't need to hear great detail  
2 about the whole decision-making process for the wind-down of  
3 these three. A little bit of background would be useful,  
4 but --

5 MR. POMERANTZ: Absolutely, Your Honor, and we  
6 will --

7 THE COURT: -- it doesn't need to be, you know --

8 MR. POMERANTZ: -- tailor our testimony to the issues  
9 that Your Honor was concerned about and the comments that I  
10 made, and we will keep within the time limit that Your Honor  
11 wants us to keep it to.

12 THE COURT: All right. Very good.

13 Mr. Seery?

14 MR. SEERY: Yes, Your Honor.

15 THE COURT: There you are. If you could approach the  
16 witness stand. I know I've been introduced to you before. I'm  
17 not sure if you've taken the witness stand yet.

18 MR. SEERY: I have not.

19 THE COURT: I don't think you have.

20 Please raise your right hand.

21 JAMES P. SEERY, JR., DEBTOR'S WITNESS, SWORN

22 THE COURT: All right. Please be seated.

23 MS. HAYWARD: Your Honor, may I approach with an  
24 exhibit binder?

25 THE COURT: You may.

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1 MS. HAYWARD: Or two?

2 THE COURT: Okay. One for the Court.

3 Thank you.

4 MS. HAYWARD: May I approach the witness?

5 THE COURT: You may.

6 DIRECT EXAMINATION

7 BY MR. HAYWARD:

8 Q Well, good afternoon, Mr. Seery. Since this is your first  
9 time testifying, would you introduce yourself to the Court and  
10 give her just a little bit of background?

11 A I'll go pretty quickly because of the time constraints.

12 James P. Seery, Jr., for the record. I am an independent  
13 director for Highland Capital. I've been in the asset  
14 management restructuring business for about 32 years.

15 I started as a restructuring lawyer handling  
16 everything from real estate to debtor's side to financial  
17 transactions. From there, I moved into asset management and  
18 distressed investing.

19 From there, I moved into managing a large global loan  
20 portfolio for a big investment bank. That included teams of  
21 people who both underwrote, distributed, held, managed,  
22 restructured, and traded both loans, indicated loan assets,  
23 primarily, but also high end bonds, distressed assets, as well  
24 as CLO assets.

25 After that, I went into a hedge fund. We had a

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1 billion, three long-short credit fund. I was the senior  
2 investment partner and president of that firm. We did similar  
3 types of investments, high yield, high yield loans, distressed  
4 loans, CLO assets, and some other structured products, long-  
5 shorts. So we were domestic primarily, but we also had a  
6 global investment view and an office in London.

7 Subsequent to that, I was a co-head of a credit  
8 business for an investment bank. And then, in the last six  
9 months, I've decided to do this job.

10 Q So of the three board members, you're kind of the stock  
11 guy. Would that be a fair --

12 A I think -- stock isn't really my stock and trade, but I do  
13 know my way a little bit around the stock market. But it's  
14 primarily been credit products, but I do -- I am familiar with  
15 equities and equity trade.

16 Q Okay. So since coming onto the board, give the Court a  
17 day in the life, if you don't mind, and maybe starting with the  
18 day that the board took over on January 9th.

19 A I think, as Your Honor will recall, when we left and we  
20 talked about what the role would be and what the compensation  
21 would be, I think your comment was, Your Honor, that it -- we  
22 wouldn't be 50,000 feet. Well, we -- we're actually fully on  
23 the ground. We're not even five feet above. We don't keep  
24 track of our hours like lawyers, but probably logged about 190  
25 hours in January starting on the 9th, and then about 150 hours,

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1 160 hours in February. And I know my fellow board members are  
2 similar time commitments.

3 We're involved day-to-day in each of the decisions  
4 that the debtor makes from assets management decisions,  
5 understanding how the funds are being managed and what the ways  
6 that they could either be walled off if they're in liquidation,  
7 or if what the proper way to treat them on a day-to-day basis  
8 is, evaluating assets that the debtor owns directly or through  
9 funds, be thinking about ways to monetize those assets;  
10 employee issues, what they're doing, who they're reporting to,  
11 how they're -- how they're performing, how they're being paid;  
12 claims issues.

13 This case got started, as we all know, by three major  
14 litigations, and they're not all easy to understand. They've  
15 got the redeemer arbitration, which I think is fairly  
16 straightforward in terms of liability and amount. There's a  
17 number of offsets that are complicated.

18 We've got the UVS litigation that is a lot more  
19 complicated because it's not against the debtor. The judgment  
20 is against two offshore funds that are, in essence, shells, and  
21 there's a very complex history around the 10-year litigation  
22 that that is.

23 Then we have the Acis litigation, which comes out of  
24 the Acis bankruptcy, but is an unliquidated claim. So  
25 understanding those thinking about what the pros and cons of

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1 those claims are, how we would manage them down the road, how  
2 we would go forward. Thinking about how to resolve them has  
3 been a key part of what we're doing on a day-to-day basis.

4 Q So has the board done an independent analysis of all these  
5 various litigation claims?

6 A Not yet. So we've -- we've done a preliminary analysis,  
7 and then we've gone further. So with respect -- we haven't sat  
8 down with -- frankly with Redeemer, yet, although one of the  
9 board members has had a call with them separately. But we have  
10 sat down with the Acis creditors, and we've done some  
11 significant analysis around that. And we have sat down with  
12 UBS claimants, and we've done significant analysis around that.

13 All three of those require a ton more work, and not  
14 because it's not easy to figure out what the numbers are. It's  
15 really difficult to figure out what the liability is, how it  
16 rolls up to the debtor, and then how to satisfy it, and so  
17 we're trying to get our hands around that. But that is a  
18 critical component of resolving this case.

19 Q When the board took over, did -- what types of things did  
20 you do immediately upon taking over control of this debtor?  
21 Did you meet with people at the facility?

22 A Oh, sure. So the first thing we did, actually, is have  
23 lunch with the Committee and with Acis, and we wanted to get  
24 their perspective because they were here and it was easier to  
25 do that than to run back to the debtor and try to -- try to

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1 then set up another meeting.

2 And so we wanted to get their perspective. They'd  
3 been living with the debtor from the litigations and through  
4 the time in Delaware and the litigation in this case. So we  
5 got a feel for them of what their desires were, how they  
6 thought the case would work out or potentially resolve, and  
7 also, how they thought about our role.

8 One of the things we stressed at that time, and I  
9 stressed when I was interviewed for the role, is that -- I know  
10 my fellow directors feel the same way, but I'm a pretty  
11 independent person, and I wasn't going to be certainly the  
12 management of Highlands guy, nor would I be the guy of the  
13 Committee. So we're going to -- I'm going to work  
14 independently make decisions with the fellow board members in  
15 what I think is the best way.

16 I'm going to try to exercise my duty in both care and  
17 loyalty to the estate, but then if the estate has duties, I'm  
18 going to make sure we exercise those. And I feel very strongly  
19 about that because this is just one -- a decent sized matter,  
20 but one small piece of a career, and I'm not going to  
21 compromise myself to satisfy either people on the management  
22 side or people on the Committee side.

23 Q Yeah. Well, and I want to talk a little bit about the  
24 duties since you mentioned them, because we heard I think the  
25 Committee say that we -- the debtor has not mentioned the

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1 fiduciary duties to the estate in the opening statement. Do  
2 you think that by presenting this motion the debtor -- does  
3 this motion contemplate protecting the fiduciary duties that  
4 the debtor owes to the estate?

5 A To me, it absolutely does. But to be fair, I think that  
6 the rhetorical flair and opening remarks and missing the duties  
7 to the estate, we're very conscious as a board of our duties to  
8 the estate. We're also very conscious of our duties as an  
9 asset manager. And what is in the pleadings is absolutely the  
10 case, it's been -- it's my experience, my understanding of the  
11 law, and it's being confirmed by both Cayman counsel, and by  
12 fund counsel in the U.S. separate from bankruptcy counsel.

13 We owe a duty under the Advisor's Act to the funds  
14 and to the investors in those funds. That duty actually  
15 supercedes the benefit to the estate, but it doesn't undercut  
16 it because by vindicating the duty to the funds, you actually  
17 vindicate the duty to the estate. If you create liability at  
18 the funds, it will roll to the estate. So by exercising your  
19 duty correctly, you do in fact, vindicate the duty of the  
20 estate.

21 And what's important in the Advisor's Act, and it's  
22 an interesting part of U.S. law. At least my understanding,  
23 it's been confirmed by outside counsel, is if the manager,  
24 which would be Highland, has an interest, it's actually  
25 required to subordinate that interest to the interest of the

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1 investors in the funds it managed. And it makes sense.

2 If you have funds invested in a fund with an outside  
3 investor, you want to make sure that that investor is not --  
4 that manager is not using your funds to aggrandize itself as  
5 opposed to looking out for your best interest. And so, I think  
6 by vindicating our obligations with respect to the funds, we  
7 actually enhance our obligations with respect to the estate.

8 Q Let's talk a little bit about the funds now. So  
9 originally, the motion pertained to three different funds.  
10 Could you just briefly explain to the Court the status of those  
11 funds and how they got there?

12 A Yeah. I'll try to go quickly, and if I skip something or  
13 I go too quickly, Your Honor, please let me know.

14 The Highland Dynamic Fund, which is the primary one  
15 we're talking about now, I think you'll see at the end of Tab 1  
16 how it's set up right before Tab 2. And I haven't looked at  
17 these exhibits in a long time, so I apologize. I didn't know I  
18 was getting this. But it's really straightforward.

19 These funds are set up, and this is a pretty typical  
20 structure. It's a limited partnership structure. It's got a  
21 master feeder structure. And what does that mean? The master  
22 is the main fund. That's the King Exemptive Limited  
23 Partnership at the bottom.

24 It's fed by two feeders, a domestic feeder and an  
25 offshore feeder. Why is it done that way? Purely tax.

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1 Offshore investors, non-taxables in the U.S. who are worried  
2 about ECI or UVTI, or unrelated business income, we want to  
3 make sure that there's no withholding or any tax ramifications  
4 with respect to the distributions they get off the fund. Since  
5 it's a pass-through entity, both of those investors, either  
6 domestic or foreign, are non-taxables in the U.S., will have  
7 their own tax treatment when it gets up to them. So they don't  
8 want anything withheld.

9           When you look at the left side of the page, Dynamic  
10 domestic feeder, the other investors is where you'd include  
11 Mark Okada. This fund was founded originally under a different  
12 name. I believe it was called the Highland Loan Fund. It  
13 might have been CLO Loan Fund, I apologize. And then that was  
14 in 2013.

15           Mark Okada put \$2 million cash into the fund at that  
16 time. Why did he put it in? This fund was designed to own CLO  
17 assets and loan assets. Okada was the founder of that part of  
18 the business and the driver of that business. It was pretty  
19 essential that he put some money in.

20           However, in '13, they did get third-party investors,  
21 but this fund never got real scale. I think it was only a bit  
22 over \$100 million. Not insignificant, but not a big fund. And  
23 they went out looking for loan funds, loan opportunities, and  
24 CLO paper. So the CLO papers, the debt of the CLOs, generally  
25 (indiscernible) type paper that was higher yielding unless

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1 there was some interesting opportunity in the -- in the higher  
2 rated tranches.

3 In 2018, the fund got restructured, and they -- I'm  
4 pretty sure that's when the name change occurred. Okada put  
5 another two and a half million dollars of cash in. So he  
6 didn't get this as free-carry or anything. This was actually  
7 cash that he deposited in the fund.

8 In 2019, Okada in the spring of 2019, determined that  
9 he was leaving Highland. And his separation was finally  
10 completed in September of 2019. So he is no longer an employee  
11 of the debtor. He has no influence, say, discussion, he's not  
12 involved in anything. He hasn't been since we've been there.

13 The investor, I think it was late summer, either  
14 understood that or the fund hadn't performed that well.  
15 Frankly, it was undersized anyway. Realdania, a third-party, I  
16 believe they're European, issued a redemption notice. This was  
17 a hedge fund style fund. So we've got three different funds  
18 here, two of them are hedge fund, and we explained a little bit  
19 in the papers, but the real dynamic, no pun intended,  
20 difference between the two is that Dynamic and Argentina are  
21 hedge funds which provide liquidity to the investor.

22 What does that mean? Monthly, quarterly, semi-  
23 annually, they can look for redemptions. The fund manager  
24 sales assets because the assets are supposed to be a little bit  
25 more liquid, makes distributions per the redemptions.

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1 If the redemptions are too big and the sales will  
2 somehow disadvantage the remaining investors, either gates come  
3 down or you put the fund into liquidation. Realdania had made  
4 a, I believe it's a \$65 million -- it was initially a smaller  
5 one, then there was a \$65 million redemption, and it -- this is  
6 prepetition. The debtor determined we've got to wind this fund  
7 up because we can't basically more than halve it and then  
8 continue to try to function. It would have been far too  
9 undersized.

10 So the debtor then went about selling the assets,  
11 creating a pool of cash, and then this motion is to liquidate  
12 it and pay the investors, including Okada. When it's done,  
13 assuming they made the full distributions, about 80-something  
14 percent of the assets will have been distributed. There's a  
15 few small assets that are left. They're not particularly  
16 liquid, but they're small and I'm relatively certain we can  
17 unload those at decent prices, create cash for the investors,  
18 make the final distribution, so it would be a hold cash to  
19 wind-down and then dissolve the various little limited  
20 partnerships.

21 Argentina is similar. The basically different  
22 premise of why that fund existed, the original theory was post  
23 the Argentina crisis with the election of Macri in '15. Late  
24 '15, Argentina started going through a number of changes in its  
25 economy and the thought was that Argentina would start to grow

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1 and really be able to realize the potential of its people and  
2 its resources. That didn't work out that well, and then at the  
3 end of, I think it was '18, Macri was voted out and the former  
4 Kirchner, effectively, government is going to back. Argentina  
5 economy has slid into basically -- certainly recession over  
6 multiple quarters, but even some would say depression.

7           Very difficult time. This was not a unique fund for  
8 Highland. There were a lot of these Argentina-type opportunity  
9 funds, and that -- that performance has not been particularly  
10 good. The decision there was made to wind-down a third-party  
11 investor who made a 15 percent withdrawal, and that a number of  
12 other funds that I forget the percentage, but they're managed  
13 by UBS, third parties made a -- indicated that they were going  
14 to have full redemptions, as well, so that fund was put into  
15 liquidation.

16           Importantly, I think something that was mentioned  
17 before, there's no benefit to keeping these funds around. They  
18 don't make any fees.

19 Q     Why is that?

20 A     And once they've gone into liquidation, they're not paying  
21 any fees. Similarly, RCP -- now, RCP is a different style of  
22 fund, and I think Your Honor, you mentioned it in the papers,  
23 you saw that it was a 10-year old fund. That term was  
24 extended. It was originally a 2008 fund. It was done as a  
25 distressed for control. Very different opportunity,

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1 (indiscernible), at the time, they probably didn't see the  
2 global financial crisis, but saw it as distressed and the  
3 opportunity to do distressed for control positions had to be  
4 long term. So that fund had no liquidity provisions for  
5 investors. Typical PE-style fund.

6 The -- when it got to the end of its life, the 10-  
7 year life, Highland didn't have the ability to extend the term.  
8 A steering committee of third-party institutional investors  
9 with no Highland influence whatsoever, Ontario Teachers,  
10 CalPERS, some of the biggest, most sophisticated investors in  
11 the world in both debt, equity, and distress were driving that.  
12 There was also a couple of other funds that are third parties  
13 on that steering group. And they still exist. They gave a  
14 one-year extension. Highland had no ability to do anything  
15 about that.

16 In exchange for the extension, Highland waived fees.  
17 So there are no fees being paid on the RCP Fund. There was a  
18 series of one-month extensions that went -- was finished in  
19 November of 2019. And with this distribution, there's still a  
20 lot of assets in RCP that have to be managed, about 175  
21 million. And so we're going to -- after we make the  
22 distribution -- we've had a few calls and I've been on them,  
23 with the steering group.

24 We've told them we're coming to Court to make the  
25 distribution. We were confident that we would be able to -- to

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1 be able to make a distribution to them subject to the Court's  
2 order, that we make that distribution and somewhere in the next  
3 two weeks we're going to have a steering group meeting to talk  
4 about the other assets and how we monetize them.

5           They are different types of assets. Some have more  
6 liquidity than others, so we're going to need to come up with a  
7 plan. It's 85 percent, roughly, third parties. Highland  
8 Capital Management, the debtor, actually has a roughly 15  
9 percent interest in HCM Services, has as a couple percentage,  
10 because I think there would have been about 2 percent of the  
11 distribution.

12           So it's vast -- the vast majority of the owners of  
13 the fund are outsiders, and we're going to need to come up with  
14 a structured plan to get them their cash because they've been  
15 invested for 12 years in this fund.

16 Q Do you agree, having had the chance to come in and look  
17 over all these things, that these funds should be wound-down?

18 A Oh, absolutely. So I think it's easiest to say,  
19 Dynamic -- Okada was the driver. It never got to where it  
20 wanted. The biggest investor wanted out. It's not big enough  
21 to support itself. Even if one were to look today, and say, it  
22 should have, frankly, owning CLO paper when this fund was  
23 started until today, there should have been good appreciation  
24 in it, and it just didn't -- I don't know the reasons it  
25 didn't, but it didn't perform the way it should have, and it

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1 didn't attract the investors it should have. Perhaps that had  
2 something to do with it, you know, the way the other cases or  
3 litigations were going on and the public nature of them.

4 And frankly, coming out of the global financial  
5 crises, Highland had had a tough time of it, so it wasn't as if  
6 it was the easiest thing to raise funds. Argentina, there's  
7 absolutely no question that the purpose and structure of that  
8 fund and what it set out to do doesn't work, just doesn't work.  
9 So it makes no sense to keep that going, and that's why the  
10 investors -- third-party investors sought redemptions.

11 The insider interests, while not immaterial, are  
12 pretty small. Okada's interest is about 12 percent in the  
13 fund, and he's not driving it. Like I said, he's not even at  
14 the debtor. These two -- but to be fair -- both the decisions  
15 to wind-down Dynamic and Argentina were made before the board  
16 was involved and before the petition was filed, and they really  
17 related to the withdrawals from third parties.

18 Q So why are we here today? Do you -- do these funds wind-  
19 down in the ordinary course of their business?

20 A Well, it -- they all have life. So I'd say in the case of  
21 RCP, it's pretty clearly in the ordinary course because it  
22 reached the end of its life. And the investors were very clear  
23 that they wanted to be cashed out. So the difficult part is  
24 that it -- because of its structure and in the way it was  
25 originally set up as a PE-style fund, it has illiquid, a number

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1 of illiquid assets.

2           And the challenge in any of the PE funds is to time  
3 your exit, and the timing on this hasn't been opportune because  
4 the opportunity to sale has not been as good as one might hope  
5 and the investors are just at the point where they want to get  
6 cashed out as we've heard today from CalPERS. But we've seen  
7 it in the documents and our discussions -- and my discussions  
8 directly with them.

9           The other funds, once they've reached this -- it's an  
10 ordinary course thing for funds. When funds either they're --  
11 they've reached their life or investors redeem and they get to  
12 this state where they really can't support themselves, it's a  
13 very ordinary thing for managers to wind-down funds.

14 Q     And as part of the winding down of the funds, is it also  
15 ordinary then to make distributions once the funds have become  
16 liquid?

17 A     Well, I mean one of the questions you started to ask, or  
18 maybe did ask, and I didn't answer, was why are we here?

19           Our view as an independent board, my view as an  
20 independent board member, is we have an obligation to all  
21 investors. It would be really easy if the documents or the law  
22 said all investors, other than ones who might have been related  
23 somehow to the asset manager. It just doesn't say that. And  
24 as we talked about, this is -- these are not funds from  
25 Highland. If they were funds from Highland, again, it would be

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1 really easy.

2           As I described for Highland Dynamic, I don't need to  
3 hold and carry water for Mark Okada. But I do need to carry my  
4 own fiduciary duties and make sure that I exercise them well.  
5 The gentleman put \$2 million in -- this is April 2013, put 2  
6 million -- 2.5 million in cash in 2018, and the fund is being  
7 wound down. It's not the debtor's money. If it was the  
8 debtor's money, it would be really easy to say, you know,  
9 Mr. Okada, I'm not going to give you the money because we may  
10 have claims against you, and a different discussion would  
11 ensue.

12 Q Well, I want to walk through that just a little bit. You  
13 say it's not the debtor's money. Where is the money?

14 A This money sits in funds or in bank accounts. Its assets  
15 are denominated and they're held in trust. And the cash that's  
16 in accounts, they're denominated in the name of the fund. The  
17 asset manager, Highland, has the ability to access the accounts  
18 and use the funds in accordance with the fund documents. It  
19 does not have the ability to access the accounts and use the  
20 funds however it see fit.

21 Q So it's like an authorized signer?

22 A It's certainly an authorized signer in terms of what its  
23 ability to do in terms of accessing the funds. Typically,  
24 that's done through the trustee. But it can manage the funds.  
25 It couldn't take the funds and make an unrelated investment.

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1 It couldn't take the funds and use it for its own purposes and  
2 pay them back later. It's just simply not permitted.

3 Q Well, taking that to the next level. If the Court did not  
4 allow these distributions to be made, would the distributions  
5 then go to the debtor?

6 A No.

7 Q Where would they go?

8 A There's really no provision for it. There are certain  
9 provisions in the underlying documents that would enable the  
10 manager to withhold funds. If there was a change in law that  
11 didn't permit a distribution. If there was some other reason  
12 that it became unfeasible to make the distribution. If you  
13 couldn't find the investor, and sometimes that happens. There  
14 are provisions of how you deal with those funds. But they  
15 never would go to the manager.

16 Q So what is the -- why is the primary reason then that  
17 we're here today asking this Court for permission to distribute  
18 these funds?

19 A It's pretty straightforward. We have a fiduciary duty and  
20 we've confirmed that with outside counsel, both Cayman and  
21 domestic fund counsel, to make distributions and treat all  
22 investors in the funds pro rata. And we're here to make sure  
23 we vindicate our duties, not exercising our fiduciary duties,  
24 doing things that were not permitted. One, we don't think  
25 that's right or appropriate. Two, that's not going to help

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1 resolve this case that probably contributes to some of the  
2 things that led to this case. So we're not real interested as  
3 an independent board in doing things that are close to the  
4 edge, along the margin, try to use our positions to leverage  
5 investors.

6 Q Are you familiar with the protocols?

7 A I am.

8 Q Okay. But for the protocols, do you believe that the  
9 debtor would need to obtain the Court's permission in order to  
10 makes these distributions on behalf of these funds?

11 A I don't think so, no.

12 Q So then, why are we asking the Court's permission?

13 A Well, the protocols require it, and I think the Committee,  
14 you know, with due respect and I mean that truly, would like us  
15 to withhold the funds, and that provides certain leverage  
16 potentially over insiders. I think when I look at the  
17 protocols, I think the main function of the protocols is to  
18 assure that there isn't undue influence by insiders over the  
19 actions of the company, and that insiders are not somehow  
20 benefitting themselves by virtue of their control over the  
21 company.

22 The independent board has control over the company.  
23 We're not naive and think we have control over every single  
24 persons every single second of every day, but we do have  
25 control over what happens with the accounts, how payments are

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1 made, when we wind something down, when an asset is sold, how  
2 the proceeds will be used. That's the board. That's not  
3 anybody in management. The decision around these distributions  
4 was made by the board independently. We did consult with the  
5 CCO, and that was important to make sure we got all the facts  
6 with respect to these funds.

7 We then sought outside counsel to inform our  
8 decision, both Cayman and domestic. We didn't have any  
9 influence whatsoever and we didn't speak to Mr. Dondero nor  
10 Mr. Okada other than to tell Mr. Okada that we were coming to  
11 court and then to ask him if he would defer his distribution.  
12 And we know his response.

13 Q I want to ask you just a couple -- I know I'm almost at my  
14 30 minutes here, so I just want to ask you a few quick  
15 questions because one of the issues that came up were these  
16 demand notes. I understand that Mr. Okada does have a demand  
17 note.

18 A He does. We've --

19 Q And has the board --

20 A And we've sent a demand.

21 Q Okay. And what was -- what is the status of that demand  
22 note?

23 A He acknowledges that he signed it and he said that he's  
24 owed certain things from the company. He's asked how we work  
25 those through because he was severed -- or severed himself in

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1 September, and he has -- they reached a severance agreement  
2 according to Mr. Okada. I haven't personally investigated it  
3 yet, but we will get to it quickly. And he has some expenses  
4 that are owed, but I don't think those are material.

5 I'm quite confident. He said his severance was  
6 agreement not money, but terms, was very standard. We'll take  
7 a look at that and make sure there's agreement on that.

8 I think it would be covered by the protocol, but it's  
9 probably a transaction, so we'd have to talk to the Committee  
10 about it, but we'll work -- I'm confident that we can work our  
11 way through a standard severance agreement very quickly and  
12 resolve that issue and collect on the note.

13 Q Now, to be clear, the demand note is payable to whom?

14 A The demand note is payable to the debtor.

15 Q Okay.

16 A It was actually a note that was -- he didn't receive cash  
17 for the note. It's basically a tax -- rather than gross-up  
18 salary sometime in the past, for whatever reason they decided  
19 not to gross it up to cover taxes.

20 Because of the structure of the limited partnership,  
21 they could have had taxable income without matching cash, and  
22 so they issued notes back to Highland to cover certain of those  
23 obligations rather than actually making a distribution.

24 Q To your knowledge, does Mr. Okada owe any money to the  
25 fund?

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1 A No. Not a -- my knowledge is that he does not. So I am  
2 knowledgeable of it, and he does not owe any money to the fund.

3 Q Okay. Quickly, I just want to talk a little bit about  
4 Mr. Dondero. One of I think the points that was made at the  
5 very beginning of opening statements was that Mr. Dondero is  
6 still around. Why is that?

7 A He's around because he has incredible knowledge about the  
8 investments. He is a portfolio manager for the fund. He does  
9 work with respect to non-Highland unrelated funds, some of  
10 which Highland employees do work under shared services  
11 arrangement and we get paid for them. But Mr. Dondero is  
12 around for those reasons and his knowledge about a number of  
13 the investments in which we're involved.

14 Q Does the Debtor -- or does the board have the power to  
15 terminate Mr. Dondero if it decides to?

16 A Yeah, he's -- we could, he's unpaid so there's no cost to  
17 his involvement. His expertise around certain investments,  
18 particularly the equity funds as well as some of the larger  
19 investments, including the PE investments, is really important.

20 Q And with respect to the Dondero notes, what are the status  
21 of those demand notes?

22 A We've done an investigation of the notes and I wouldn't  
23 say it's as exhaustive as -- it's in similar stages as our  
24 examination of other assets. We've looked at Dondero's notes,  
25 we made a decision to send a demand letter to Okada because

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1 he's no longer a part of the company and there's no real  
2 benefit that we saw strategically to not making that demand.  
3 It's a small amount of money relative to the size of the case,  
4 it's real money, but it's a small amount of money relative to  
5 the size of the case. We should clean that up and move on from  
6 Mr. Okada.

7           With respect to the Dondero notes on Dondero entity  
8 notes, we want to think about those strategically. They're a  
9 sizable amount of money, not just the ones that are demand, but  
10 also there's a number of the notes that ate notes with  
11 maturities and they're actually current, they're all current,  
12 but how can we use those cash, can we collect those, and I  
13 think that's more strategic in terms of how we resolve this  
14 case.

15           I agree with Mr. Pomerantz's statement that I think  
16 it evolves into a pure litigation case and we really hope it  
17 doesn't. That then -- those can just be sued on and the demand  
18 notes are pretty clear as to how they work and even include  
19 cost of collection. So they're pretty straightforward notes.

20 Q     But so for now the board --

21 A     Well, we thought about it, we don't think it makes sense  
22 to make that demand at this time. There's -- our initial --  
23 we're not -- we haven't come up with what the plan is for this  
24 case, but we have ideas. We do think they involve Mr. Dondero  
25 and they involved contributions from Mr. Dondero whether in the

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1 form of notes, whether in the form of cash, whether in the form  
2 of other assets. We haven't discussed those with him, but we  
3 do think that's ultimately, at least preliminarily, where we're  
4 going to end up somewhere. So strategically we think that  
5 that'll make sense to include in that sort of a resolution.

6 Q Okay. And --

7 THE COURT: You have one minute.

8 MS. HAYWARD: Yes, thank you, Your Honor.

9 BY MS. HAYWARD:

10 Q Last question I'm going to ask you, are you aware of any  
11 legal basis to withhold these funds now from Mr. -- from these  
12 investors and these related parties?

13 A I'm not aware of any, but as the Court has contemplating,  
14 as the Committee has said, perhaps now that Section 105, you  
15 know, grants that sort of authority, but that'll be up to the  
16 Judge.

17 MS. HAYWARD: Your Honor, a housekeeping matter. I  
18 move for the admission of Exhibits 1 through 12. I don't think  
19 any of them are controversial. But I will let --

20 THE COURT: You want me to look through

21 MS. HAYWARD: Your Honor, they are --

22 THE COURT: -- all of these.

23 (Laughter.)

24 MS. HAYWARD: Your Honor, just for the record, they  
25 are Number -- Exhibit 1 is the chart showing the structure of

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1 the Dynamic Income Fund.

2 THE COURT: Right. We looked at that.

3 MS. HAYWARD: Exhibit 2 is the partnership agreement,  
4 so I know they're large documents, but they're not numerous  
5 documents. Exhibit 3 is just the chart of the Latin America  
6 Argentina Fund. Four, the partnership agreement for that fund.  
7 Five, the chart (indiscernible) Third Fund. Six would be the  
8 agreement, the limited partnership agreement for that fund.  
9 Seven, Your Honor, is Your Honor's order on the ordinary course  
10 governance procedures.

11 THE COURT: Okay.

12 MS. HAYWARD: Eight is the final term sheet. Nine is  
13 the notice of amended operating protocols that was filed last  
14 week.

15 THE COURT: All right. And then CVs of our board  
16 members.

17 MS. HAYWARD: And then the CVs for the board members.

18 THE COURT: Any objections to these?

19 MS. REID: No objection, Your Honor.

20 THE COURT: Okay. They're admitted.

21 MS. HAYWARD: Okay.

22 THE COURT: All right. Any cross-examination?

23 MS. REID: Yes, Your Honor.

24 THE COURT: Okay.

25 MS. REID: Good afternoon, Your Honor. Penny Reid on

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1 behalf of the Creditors Committee.

2 CROSS-EXAMINATION

3 BY MS. REID:

4 Q Good afternoon, Mr. Seery.

5 A Good afternoon.

6 Q You are aware, Mr. Seery, aren't you, of the Acis  
7 bankruptcy?

8 A I'm aware of it, yes.

9 Q Okay. And you're aware that prior to that bankruptcy Mr.  
10 Terry obtained an arbitration award in October of 2017.  
11 Correct?

12 A I'm aware of that, yes.

13 Q And, Mr. Seery, are you aware that four days after that  
14 arbitration award assets started being transferred away from  
15 Acis, stripping it of its value at that time?

16 A I've read the judge's decision in the Acis case but I'm  
17 not aware of any of the underlying facts, other than from  
18 reading that case.

19 Q So you aren't aware of all the assets that went out of  
20 Acis the day after an arbitration award was entered.

21 A No, I haven't looked at any of those.

22 Q Okay. And you're not aware that the day after a final  
23 judgment was entered more assets were stripped from Acis. Is  
24 that correct?

25 A Other than reading the Judge's decision I'm not aware of

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1 any of the specific assets, no.

2 Q Are you aware that two days after that, or entry of the  
3 final judgment was ordered, Acis' entire risk retention  
4 structure was transferred away from it and into the ownership  
5 of Highland CLO Holdings?

6 A I'm aware of some of the facts relating to the Acis case  
7 from the decision and I'm aware of some of the facts from the  
8 Acis case because of my discussions with Ms. Patel and Mr.  
9 Terry. I'm not aware of the specific transfers to which you're  
10 referring without having -- looking at them.

11 Q Okay. So you're not aware that some of the assets that  
12 were stripped from Acis went to one of the entities you're  
13 wanting to send money to today. Is that right?

14 MS. HAYWARD: Objection. Your Honor, I'm not sure  
15 how this is relevant to the Debtor's distribution motion --

16 MS. REID: Well, it's relevant to the distributions  
17 that you're trying to give to the same entity.

18 MS. HAYWARD: Your Honor, I think right now Mr.  
19 Okada --

20 THE WITNESS: What I --

21 THE COURT: Just a minute.

22 THE WITNESS: Sorry.

23 THE COURT: We have an objection. Let me hear the  
24 objection.

25 MS. HAYWARD: Your Honor, I think at this point Mr.

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1 Okada is the only one getting a distribution at issue in this  
2 case as of now in light of the representation that was made by  
3 Judge Lynn.

4 THE COURT: All right. Well, what is your response  
5 to the relevance objection? She's saying that this line of  
6 inquiry has kind of been taken off the table since -- I'm not  
7 sure which entity, I think you're talking about the Holdco, CLO  
8 Holdco. Right?

9 MS. HAYWARD: Yes, Your Honor.

10 THE COURT: Since now the disbursement that would  
11 have gone to it is being put off the table and would go into  
12 the registry of the Court. So what is your response?

13 MS. REID: Well, Your Honor, and I can take it off,  
14 but currently it's my understanding that Mr. Okada is a 25  
15 percent owner in Holdco. But I can move on to the next  
16 question.

17 BY MS. REID:

18 Q Which is, are you aware that Mr. Okada right after the  
19 final judgment was entered transferred their entire interest to  
20 Nutra Limited?

21 A Who transferred to whom?

22 Q Right after the final judgment --

23 A Right.

24 Q -- that Mr. Terry obtained, Mr. Okada transferred their  
25 entire limited partner interest in Acis, LP to Nutra.

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1 A So I apologize. A couple of things. One is it goes to  
2 what you said, I don't believe Mr. Okada has any interest in  
3 sale of Holdco, but you're saying Mr. Okada and their in your  
4 question, and so it doesn't make sense. He's an individual.  
5 So I just don't know what you're asking me. You said Mr. Okada  
6 transferred their interest. Who's their?

7 Q Are you aware that Acis -- that you're aware that after  
8 the entry of the Acis judgment that Mr. Okada's limited  
9 partners interest in Acis was transferred to Nutra?

10 MS. HAYWARD: Again, Your Honor, I lodge the same  
11 objection to relevance.

12 THE COURT: All right. Again, what is your response  
13 to the relevance objection?

14 MS. REID: I think it's very relevant because I mean  
15 he has been saying that they have a fiduciary duty to  
16 investors. Mr. Okada is not your normal independent investor.  
17 It's a related party that has engaged in prior improper acts in  
18 this court which you're aware, aren't you -- well.

19 THE COURT: Yeah, I'll overrule the objection and  
20 allow a little latitude.

21 THE WITNESS: So I think what you're referring to is  
22 the position in Nutra and I'm aware of some of those issues.  
23 Mr. Okada apparently owns 25 percent of Nutra, Mr. Dondero owns  
24 75 percent of it. The control in Nutra is actually vested in  
25 Highland Capital Management through a control agreement. So

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1 I'm not -- I'm aware that they made a transfer and that Nutra  
2 owns that interest now, and I'm aware that that split is 75-25,  
3 I assume because of that split just like ATM Services, Mr.  
4 Okada doesn't have any say in how it's run. And the control in  
5 that entity anyway is vested in Highland, the Debtor.

6 BY MS. REID:

7 Q So you're aware there were improper transfers made at --  
8 during -- before the Acis bankruptcy. Is that correct?

9 A I'm aware --

10 Q You're not aware?

11 A I'm aware of the decision and I'm aware of the transfers.  
12 The designation of it then as improper, I'm not sure that I can  
13 say one way or the other because I've looked at the transfers  
14 and I can't tell you whether that transfer was improper. So if  
15 you're asking me if I'm aware that that transfer occurred, I  
16 think I said I was. I don't think it's fair for you to color  
17 that the transfer was improper. If somebody --

18 Q Are you aware of the Court's decision --

19 A I am --

20 Q -- that they were improper?

21 A -- I don't recall the Court's decision with respect to  
22 that transfer. There were a lot of transfers, a number of  
23 which the Judge ruled were improper.

24 Q Okay. So you are aware that there were improper transfers  
25 made from Acis that the Judge found were improper. Correct?

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1 A Yes, I am.

2 Q Okay. And you're aware that Mr. Okada was the Chief  
3 Investment Officer at the time those transfers were made.  
4 Correct?

5 A Of which entity?

6 Q Of Highland, of the Debtor.

7 A I believe he was -- I believe he was a co-CIO of the  
8 Debtor at that time, but I'm not positive.

9 Q So you don't know.

10 A I'm not sure, no.

11 Q Okay. Do you know he was -- he was the Debtor's -- so you  
12 do not know one way or the other.

13 A I am aware that at some time he was the CIO and then the  
14 co-CIO. I don't know the specific time that he was the sole  
15 CIO. I just don't know.

16 Q Do you know if he was involved with the Debtor at the time  
17 these improper transfers were made?

18 A He definitely worked for the Debtor at that time.

19 Q Okay. You -- the reply that was filed today by the --  
20 this morning by the Debtor states that the making of these  
21 distribution to Mr. Dondero and Mr. Okada is essential to  
22 rebuilding the Debtor's reputation in the marketplace. Is that  
23 correct?

24 A I believe that's what it says, yes. I assume you're  
25 reading it?

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1 Q I am.

2 A Okay.

3 Q Aren't you -- is the marketplace not well aware of  
4 Highland's history including the Acis and the Redeemer  
5 Committee litigation?

6 A I believe the market is aware of the Acis and Redeemer  
7 litigations.

8 Q Okay. And is the marketplace well aware of the extensive  
9 wrongdoing that Mr. Okada and Mr. Dondero engaged in as found  
10 by this Court and the other tribunals?

11 A I don't know how the marketplace -- I know that they're  
12 aware of the decisions, I can't tell you whether the  
13 marketplace as a large general matter knows the specifics. I  
14 don't know.

15 Q Have any non-insider investors expressed concern to you  
16 over the possibility of Mr. Okada not receiving the  
17 distribution?

18 A No, I don't believe so. I think -- just to make sure I  
19 answered your question, have the non-insiders raised issues  
20 about Mr. Okada --

21 Q Not getting distribution.

22 A No, there won't --

23 Q No one is really concerned about that except Mr. Okada.  
24 Correct?

25 A I think each investor is concerned about their own

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Seery - Cross/Reid

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1 distributions, so like with respect to RCP I don't CalPERS  
2 referred at all to the distributions to Ontario, they probably  
3 don't care, they care about their own distributions.

4 Q And the only one we're talking about right now is the one  
5 to Mr. Okada. Correct?

6 A That's correct. I hope so. Right? Meaning I'm under the  
7 impression that the Committee doesn't object to the investment,  
8 to the release of funds and the distribution to third-party  
9 investors.

10 Q Mr. Seery, you testified that one of the reasons you're  
11 seeking to distribute these funds is because the Debtor has  
12 fiduciary duties to investors. Correct?

13 A Yes.

14 Q Okay. But these funds aren't being distributed to just  
15 regular investors. Correct? They're being distributed to  
16 insiders.

17 A Again, unfortunately these are things one has to be  
18 precise with. The question is insider under some securities  
19 law, or insider under the Bankruptcy Code? So --

20 A Insider under the protocols.

21 Q I believe the term there, again, we should be precise, is  
22 related party. So he's a related party under the protocols.  
23 As far as I know there's no separation under the Investment  
24 Advisors Act, under the Cayman law, under Delaware law, or  
25 under the contracts with respect to persons who might have

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Seery - Cross/Reid

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1 worked for the investment manager who made an investment in the  
2 fund.

3 Q Are you aware that the Debtor also has duties to the  
4 Creditors Committee?

5 A I don't believe the Debtor has any duties to the Creditors  
6 Committee.

7 Q To the estate?

8 A I believe the Debtor has significant and overriding  
9 duties, but that's what we're here for, to the estate.

10 Q To the estate. And were very conscious of those duties.  
11 Correct?

12 A I am indeed.

13 Q That's what you testified. Right?

14 A Yes.

15 Q Okay. So can you explain to me what -- how you consider  
16 the estate's considerations in deciding to distribute these,  
17 what was your consideration of the estates, how does this  
18 benefit the estate?

19 A This benefits the estate because we have an obligation to  
20 the funds and to the investors in the funds to perform  
21 according to the terms of the funds. Unfortunately there is no  
22 provision in the fund documents or in the law that allows us to  
23 treat the investors in the funds in a disparate way. And we  
24 believe, after consulting with outside counsel, domestic and  
25 Cayman, considering federal law under the Advisors Act, as well

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1 as Delaware law, that the only way to make distributions, other  
2 than if there was a law change, was pro rata to all of the  
3 investors.

4 So in order to vindicate our obligations to the  
5 outside investors, we also have to pay the inside investors.  
6 In addition, if we don't pay the inside investors, there's no  
7 basis not to do that. Now there may ultimately be no liability  
8 because it will be hard to bring a case. But it seems to me  
9 that incurring potentially liability is not in the best  
10 interest of the estate. Holding up a distribution from non-  
11 estate property doesn't seem to do anything to help the estate.  
12 In fact, it puts it at risk.

13 And so we did the work and that's how we determined,  
14 exercising what I think is our duty of care, which is really  
15 researching this, and we spent a lot of time and a lot of money  
16 making sure we got this right. And our duty of loyalty. Is  
17 there some good reason that the fund could hold up the  
18 distribution. Until we have a claim is there a valid to attack  
19 these distributions.

20 By the way, there were \$8 million out of 180 million.  
21 Now if there had been 180 -- if there had been 172 out of 180,  
22 maybe we would come in here and say, We should something a  
23 little bit different because we're really letting the small  
24 outside investors dictate us and force us to make distributions  
25 to related parties that the Committee has some concern about.

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1 But while \$8 million is real money, and I don't deny  
2 that, again, it's not huge in this case. And it seemed to us,  
3 after doing the work, that we were putting the estate at risk  
4 by not exercising our fiduciary duties. Moreover, we each have  
5 reputations, and they're important to us, and they don't  
6 override our fiduciary duties. We're not going to do things to  
7 aggrandize ourselves, to help our reputation versus the estate.  
8 But running this Debtor correctly seems to us, looking at the  
9 history, was the right thing to do.

10 Q Has anyone, Mr. Seery, threatened to bring a fiduciary  
11 duty claim against you if you don't pay these funds?

12 A No.

13 Q Has any -- has Mr. Okada said he's going to bring a claim  
14 against you if you don't distribute these funds?

15 A No, and nor did I consult him about it. We just told him  
16 what we were doing. We're not -- I'm not inviting someone to  
17 sue us. That I think would be, you know, grossly wrong for us.

18 Q Now we've touched a little bit on this, Mr. Okada owes the  
19 Debtor 1.3 million. Correct? In the demand note?

20 A Approximately, yes.

21 Q All right. And you have made a demand on Mr. Okada.  
22 Correct?

23 A That's correct.

24 Q And he hasn't paid it. Right?

25 A No, he has not.

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1 Q And that's money into the estate. Correct?

2 A That will be, yes.

3 Q Now do you still think it's okay to just hand him off, you  
4 know, \$4 million and even though he's not paying the estate  
5 that you have a duty to?

6 A There's no such thing in my life as just handing off \$4  
7 million. This is fund money --

8 Q Distributable.

9 A -- that will be distributed to the owners of the fund pro  
10 rata. We're not handing off anything to Mr. Okada or anybody  
11 else.

12 Q But Mr. Okada has not agreed to pay back his note.  
13 Correct?

14 A He's not agreed to pay it back, no. Technically I would  
15 say no.

16 Q Okay. And that's because of some severance agreement that  
17 you're not aware of what the terms are. Is that right?

18 A I have not -- we have not -- I have not looked at the  
19 terms, I don't believe many of my fellow directors yet have.  
20 It's something that is on the burner for us to get to as soon  
21 as this is over.

22 Q And are --

23 A He's pushing for it.

24 Q -- are you aware that the Committee has asked for that  
25 severance agreement?

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1 A I was not aware of that, no.

2 Q You're not aware of that.

3 A I haven't seen it.

4 Q And you don't know that it hasn't been produced to us. Is  
5 that correct?

6 A I don't -- I have not seen it myself, I don't -- didn't  
7 know that you'd asked for it, nor do I know that it hadn't been  
8 produced.

9 Q Okay. And you haven't looked at it.

10 A I haven't seen it.

11 Q So you don't know if his failure to pay that money back is  
12 valid or not. Is that correct?

13 A That's -- I don't -- he still owes the money whether he  
14 has appropriate setoffs and whether a settlement agreement  
15 would actually work as one. I don't -- haven't really analyzed  
16 that and I don't know that our counsel has either. It may be  
17 that he owes the money and we're holding a severance agreement,  
18 but those aren't mutual obligations that are subject to setoff.

19 Q You don't know one way or the other whether he has a right  
20 of setoff. Correct?

21 A I don't believe he -- other than perhaps expenses I  
22 don't -- haven't heard any articulated monetary setoff against  
23 the obligations he owes.

24 Q If the Court orders that his distribution be put into the  
25 Court registry, do you still think you've breached your duty to

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Seery - Cross/Patel

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1 the estate somehow by that?

2 A I think if the Court orders it, I don't think we would be  
3 subject to a breach of liability. I think that we're here  
4 vindicating our responsibilities and our duties to investors.  
5 If there's an interceding court order, we will follow it.

6 Q Thank you.

7 MS. HAYWARD: I have no further questions.

8 THE COURT: All right. I think that was about 17  
9 minutes. Any other examination? Okay. You'll have 13  
10 minutes.

11 MS. PATEL: Just a few questions, Your Honor.

12 CROSS-EXAMINATION

13 BY MS. PATEL:

14 Q Good afternoon, Mr. Seery.

15 A Good afternoon.

16 Q Mr. Seery, I think your testimony was that the fund, let's  
17 use RCP -- or I'm sorry, that's the wrong one --

18 A Dynamic?

19 Q I think it was the Dynamic --

20 A Dynamic.

21 Q -- Income Fund is the one that Mr. Okada has an  
22 investment in. Correct?

23 A That's correct.

24 Q Okay. And the fund has duties to Mr. Okada including  
25 fiduciary duties as an investor. Right?

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1 A That's correct.

2 Q Okay. Does Mr. Okada have duties to the fund?

3 A I don't believe he does, no.

4 Q Okay. Did he ever?

5 A I believe he did.

6 Q Okay. That was during his tenure at Highland Capital  
7 Management. Right?

8 A I think as an officer of Highland Capital Management, the  
9 investment manager, he would have had duties to the fund, yes.

10 Q Okay. And have you investigated whether he's breached any  
11 of his duties to the fund?

12 A We have looked, we have not seen anything. We know that  
13 the redemptions came in without any objection. We have not  
14 spoken to the individual investors.

15 Q Okay. So would it be fair to say then that you haven't  
16 concluded your investigation of whether Mr. Okada has breached  
17 any of his duties to the fund itself?

18 A I don't think that would be fair. I think what would be  
19 fair to say is we've taken a look, we see no evidence  
20 whatsoever that there were any breaches by Mr. Okada of his  
21 duty to that fund, so there would be no reason to undertake an  
22 investigation that we had yet to complete.

23 Q Okay. And who undertook that investigation, was it just  
24 the board or did you have others involved?

25 A It was the board.

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Seery - Cross/Patel

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1 Q Okay. No one else?

2 A The investigation with respect to the -- we got data from  
3 other people but I'm the one who looked at whether there were  
4 any claims related to the redemptions, any objections to any of  
5 the other distributions, any objections to the fees, and we  
6 found none.

7 Q Okay. So no outside counsel advised you with respect to  
8 whether Mr. Okada had potentially breached any duties to the  
9 fund?

10 A No, again, it's not something that we would have looked at  
11 with no evidence whatsoever that there was any sort of  
12 complaint or breach.

13 Q Okay. All right. Mr. Seery, with respect to the, I'll  
14 call it the agreement because I'm assuming that it is an  
15 agreement, that Mr. Dondero's counsel announced on the record  
16 regarding putting the funds that would otherwise be payable to  
17 Mr. Dondero into the registry of the Court. Do you have an  
18 understanding whether that agreement also extends to Highland  
19 Capital Management Services?

20 A Yeah, just to be clear because, again, we should be  
21 precise, Mr. Dondero was not going to receive any money. The  
22 CLO Holdco, which is owned by the charitable DAF has  
23 investments in the Argentina Fund and the Dynamic Fund. It was  
24 going to receive money. Highland Capital Services has around a  
25 2 percent interest in RCP, it was going to receive money.

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1 I understand that Mr. Dondero, through his counsel,  
2 directed that the distribution to Highland Capital Services  
3 would not be made. Mr. Okada owns 25 percent of that, he was  
4 not consulted. I know that because I spoke to Mr. Okada. The  
5 distribution with respect to the CLO Holdco has been similarly  
6 treated, but that was done by Grant Scott talking to Mr. Nelms  
7 (phonetic) for the charitable DAF that controls the CLO Holdco.  
8 Q Okay. So, again, to be clear, Mr. Okada has not consented  
9 to the agreement that was announced on the record with respect  
10 to any distributions to Highland Capital Management Services.  
11 Correct?

12 A He has not, but since he doesn't control it and Mr.  
13 Dondero does, the agreement is binding.

14 Q Okay. And how do you know that Mr. Dondero controls  
15 Highland Capital Management Services?

16 A Mr. Okada told me.

17 Q Okay. All right. Mr. Seery, with respect to Mr. Okada, I  
18 believe your testimony was he separated from Highland Capital  
19 Management in September of 2019. Correct?

20 A I believe I testified that he originally began his  
21 separation in the spring, I don't know exactly when it was, and  
22 I believe his official resignation was some time around  
23 September.

24 Q Okay. Would September 30 of 2019 sound about right?

25 A It -- approximately, I don't know the date.

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1 Q Okay. So it was towards the end of September though.

2 Correct?

3 A I don't -- I don't know whether it was September 1,  
4 September 15 or September 30, I just don't know the answer.

5 Q Okay. And at the time Mr. Okada separated from Highland  
6 or any time before then, did Mr. Okada have a non-compete  
7 agreement?

8 A I have not looked at Mr. Okada's contract.

9 Q Okay.

10 A So I don't know.

11 Q All right. Does -- did Mr. Okada have something called a  
12 non-solicit --

13 A I don't know.

14 Q -- where he wouldn't solicit clients for example of  
15 Highland Capital Management?

16 A I don't know.

17 Q Okay. Did Mr. Okada have what's called a non-recruit  
18 where he wouldn't come in and try and recruit employees of  
19 Highland Capital Management?

20 A Again, because I haven't looked at his contract, if he had  
21 one, I don't know that he did, and because I haven't looked at  
22 it, and I testified that I haven't seen this severance  
23 agreement he's talking about, I don't have any understanding of  
24 the terms of Mr. Okada's employment with Highland Capital  
25 Management.

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1 Q Okay. So you just haven't looked at any of those things.

2 A That's correct.

3 Q All right. Are you aware -- well, did you have an  
4 opportunity to look at -- I believe there was a press release  
5 that was somewhere around September 2019 where Mr. Okada said  
6 he was actually retiring from Highland Capital Management?

7 A I would have no reason to have looked at such a thing in  
8 September.

9 Q Okay. All right. So you haven't seen that. Let me ask  
10 you another question, are you aware that Mr. Okada has a new  
11 business by the name of Sycamore Tree Capital?

12 A I'm aware that he intends to start a new fund, I have no  
13 idea what the name is and I'd have no idea what development --  
14 stage of development it's in.

15 Q Okay. Are you aware if any Highland employees have been  
16 engaged by Sycamore Tree Capital

17 A I'm aware that at least one maybe, I'd have no idea  
18 whether that employee, ex-employee now, is involved or not.

19 Q And isn't that employee Troy Parker?

20 A That's correct, yes.

21 Q Okay. What did Troy Parker do for Highland Capital  
22 Management?

23 A Most recently he ran the PE book.

24 Q Okay.

25 MS. PATEL: No further questions, Your Honor.

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Seery - By the Court

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1 THE COURT: All right. We have seven minutes. Do  
2 you have questions, Judge Lynn? We have a little bit of time?

3 JUDGE LYNN: No, but I just want to make clear Mr.  
4 Dondero's suggestion for resolving the motion was not a  
5 dickered agreement, it was a suggestion that we would hope  
6 would make life easier for the parties and the Court.

7 THE COURT: Okay. Thank you. Thank you.

8 I had one or two questions. Is there going to be  
9 redirect? Well, no, you used all your time, you don't get  
10 redirect.

11 (Laughter.)

12

13 MS. HAYWARD: And, Your Honor, I don't have redirect.

14 THE COURT: Oh, very good.

15 EXAMINATION

16 BY THE COURT:

17 Q Let me ask you, sir, I want to revisit Dynamic, that's the  
18 one I hear most about obviously since that's the one that Mr.  
19 Okada --

20 A Yes.

21 Q -- has the distribution rights from. You know, I was  
22 fixated before I came out here a little on the time line.  
23 Right? So the pleadings said Dynamic, the termination date was  
24 November 15, 2019.

25 A Correct, Your Honor.

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Seery - By the Court

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1 Q About 30 days after the Highland bankruptcy was filed.

2 What I heard your testimony to be was that pre-petition the

3 largest third-party investor -- I wrote it down phonetically --

4 A Realdania.

5 Q -- Realdania --

6 A I'm not sure if there's someone in the courtroom who know

7 them.

8 Q Sounds like a Spanish company maybe.

9 A I believe they're a European company, it's an investor I'm  
10 not familiar with, Your Honor, but I have seen the redemption  
11 notices.

12 Q Okay. They issued a \$65 million --

13 A I believe it was in the neighborhood of 65 million, yes.

14 Q And it was pre-petition? You wouldn't know?

15 A It was pre-petition, I think it was around 40 percent of  
16 the fund.

17 Q Okay. I mean do you remember when? Was it --

18 A I believe it was in the spring and it followed a -- spring  
19 or early summer and it followed a separate redemption from a  
20 different investor.

21 Q Okay. So there was another third-party investor, even  
22 before Realdania that --

23 A That's my recollection, yes, Your Honor.

24 Q -- that was unaffiliated with Highland.

25 A That's correct.

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Seery - By the Court

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1 Q Okay. So it's your business judgment that once these two  
2 biggies issued their redemptions, it just wasn't worthwhile to  
3 keep this fund going anymore.

4 A That's correct, Your Honor. And as I said, Mr. Okada was  
5 a driver to that fund and he had left. He did not actually  
6 redeem, but he was being compulsory redeemed as the fund went  
7 into liquidation. So all of the investors, redeemed and non,  
8 will be treated the same.

9 Q All right. So I guess one thing I'm getting at is timing  
10 of Mr. Okada leaving versus timing of these third-party  
11 redemptions happening.

12 A Right. I could --

13 Q Is there any --

14 A I see no connection whatsoever. And, again, his piece of  
15 the fund was about -- I believe it was round 12 percent of the  
16 fund.

17 Q Yeah, his --

18 A And it's a material amount of money I suppose to most  
19 folks, including myself, but it's not -- it wasn't a driver  
20 whatsoever that we could see, and he did not redeem. So the  
21 third-party redeemed, Okada was leaving having been the driver  
22 of the fund, it was an undersized fund anyway, there was no  
23 real valid reason to keep a small fund trying to do this around  
24 after Mr. Okada left.

25 Q Okay. I'm just wondering whether I should or not, you

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Seery - By the Court

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1 know, the timing of this. So this is -- starts spring of 2019,  
2 but then a month post-petition let's terminate this thing. I  
3 mean who actually makes that decision?

4 A Well, the decision to continue forward is made by the  
5 board. Before that it would have been made by the managers of  
6 the funds or the compliance group. So I have not looked into  
7 specifically who said, Let's terminate it. To be perfectly  
8 frank, I don't know --

9 Q But it would --

10 A -- the specifics.

11 Q -- the manager, Highland?

12 A It's Highland who determines to terminate it. Ultimately,  
13 if all the investors issued redemption notices, then the fund  
14 would have to liquidate --

15 Q Right.

16 A -- on its own. So Highland --

17 Q Right.

18 A -- wouldn't have any say about it. But to put it into  
19 liquidation, I believe it was Highland that did it. Some of  
20 the funds, it could be foreign directors, but that's not what  
21 happened.

22 Q Uh-huh. Okay. So there are third-party non-affiliated  
23 investors still in it, there's 35 million that would go out the  
24 door and --

25 A It's about -- there's a couple of assets that still have

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Seery - By the Court

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1 to be liquidated. Approximately 85 percent of the distribution  
2 is to third-party un-affiliated investors. And then we --  
3 we'll have -- we'll retain some cash to make sure that we can  
4 manage the liquidation of the fund and the dissolution of the  
5 entities. But we still have to get rid of a small amount of  
6 assets that are pretty liquid.

7 Q Okay. Now I heard you also say that Highland isn't owning  
8 any fees anymore on these refunds. Did I not hear you say  
9 that?

10 A Yeah, certainly -- so I think on ours I think. On Dynamic  
11 and on AROF, the Argentina Recovery Opportunity Fund, once they  
12 were put into liquidation they don't earn any fees anymore.  
13 The --

14 Q Okay. Let me -- okay, so when did that stop, when were  
15 they "put into liquidation" so the management fees stop?

16 A I believe that Dynamic would have been in the fall, I  
17 don't know the exact date, and Argentina --

18 Q Well --

19 A -- was before that.

20 Q -- the Court termination date used in the pleadings was  
21 November 20, 2019.

22 A Yeah, but I don't recall the exact date, Your Honor. We  
23 can certainly figure that out, I just don't recall off the top  
24 of my head. When the fee cutoff date -- the fee cutoff date  
25 for RCP was I believe in April of 2018 when the one-year

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1 extension was given. That was the trade for the extension.

2 Q Okay. But you don't know for sure when the management fee  
3 cutoff was --

4 A No.

5 Q -- on either Argentina or Dynamic.

6 A No, that's correct, Your Honor.

7 Q I mean would it have been in November 2019 you think?

8 A I think it was before that, but I don't -- I believe so  
9 but I don't know for sure.

10 Q Okay.

11 A If I'm wrong, I'll figure that out and correct it to you.

12 Q Okay. All right. Thank you. You're --

13 A Thank you.

14 Q -- excused.

15 A Thank you.

16 THE COURT: Does anyone in the room know the answer  
17 to that?

18 MS. HAYWARD: Your Honor, we can figure it out very  
19 quickly I think.

20 THE COURT: Really? Okay.

21 (Pause in the proceedings.)

22 THE COURT: Actually I had one more question for Mr.  
23 Seery.

24 THE WITNESS: Yes.

25 BY THE COURT:

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Seery - By the Court

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1 Q Do we have any other Highland managed funds out there that  
2 are imminently going to be going into wind-down mode? Is that  
3 easy to answer?

4 A We have a number of CLO funds that are what we call 1.0  
5 CLOs. They're old and they're effectively winding down. And a  
6 number of those we don't get fees off of, but they had --  
7 because they own very illiquid assets, we have to realize on  
8 those assets. May of those have cross-ownership to funds that  
9 we do get fees on. We need --

10 Q Let me back you up. Why didn't Highland get fees on  
11 those?

12 A Because sometimes in the CLO structure it depends on what  
13 kind of asset gets treated under the net asset value, so for  
14 example if it's equity, it may not count, even if it has a  
15 value, you don't get paid a fee on it. So if you had a loan  
16 that converted to equity, some of those CLOs you may not get a  
17 fee on because you don't own any loans anymore. So, but most  
18 of those assets, if a CLO owned equity for example in a PE  
19 company, we would have other funds that owned additional equity  
20 in that same PE company.

21 We do have other assets where they aren't necessarily  
22 wind-down, but there will be distributions to entities that may  
23 or may not be related parties under the protocols, and we are  
24 in the process, and the Committee's aware of it, selling  
25 certain assets, and hopefully those sales will go the way we

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Seery - By the Court

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1 want them to. They're valuable assets so we feel we have a  
2 good opportunity to realize good value for the estate. There  
3 would be requirements on certain of them to pay off debt from  
4 certain entities before we can distribute money back up to  
5 Highland Capital.

6 Q All right. Thank you.

7 A Thank you.

8 THE COURT: You're excused.

9 All right. Anything else today?

10 MR. POMERANTZ: Do you want to hear closings, or have  
11 you heard enough, Your Honor?

12 THE COURT: I mean if you have a quick one or two  
13 minute closing, I'll hear that, to recap anything. Did you  
14 have that quick answer that Ms. Hayward --

15 MR. POMERANTZ: We are --

16 THE COURT: -- was confident about?

17 MR. POMERANTZ: We are trying to find it.

18 THE COURT: Okay.

19 MR. POMERANTZ: We have a couple of emails out,  
20 hopefully by, we get a couple of answers.

21 THE COURT: Okay. Okay.

22 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

23 MR. POMERANTZ: Your Honor, I just wanted the  
24 highlight the fiduciary duty as you -- I know it was a subject  
25 of discussion with Mr. Seery, cross-examination. Again, as you

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1 heard, and as the only evidence before Your Honor is, Mr.  
2 Seery, who as Your Honor knows is a restructuring lawyer,  
3 practice in it. He's fully aware of what the fiduciary duty  
4 requires.

5           And first and foremost, I think it may even be 28 USC  
6 959, the Debtor has to operate in accordance with applicable  
7 law. Every debtor before Your Honor has to act in accordance  
8 with applicable law, and if the debtor is not acting in  
9 accordance with applicable law, then they are creating  
10 liability. As Mr. Seery testified, that is exactly what that  
11 the Debtor is doing. And this concept of dueling fiduciary  
12 duties or the board taking certain actions that just happened  
13 to benefit insiders as indicating that they are not looking out  
14 for the estate is just not accurate. That's not how the law  
15 works and I think Mr. Seery said it correctly, that the Debtor  
16 fulfills its fiduciary duty to the estate by operating in  
17 accordance with applicable law.

18           With respect to 105, Your Honor, the cases cited by  
19 the Committee don't support granting injunctive relief forward  
20 of attachment without going through the necessary process.  
21 They do cite the DeLorean case which at first blush sounds like  
22 a court authorized the holding of money, but if you read that  
23 case carefully, it was done because there was a complaint and  
24 because the Court ultimately determined that the evidence  
25 before the Court established grounds for preliminary

1 injunction.

2           Mr. Clemente has asked Your Honor to hold that the  
3 objection filed satisfies the standard. But the objection  
4 isn't a legal document. The Committee has not put on any  
5 evidence to support any claims that exist. The testimony from  
6 Mr. Seery is that there's a claim under a note and that there  
7 are defenses to the note. So Your Honor does not have the  
8 sufficient evidentiary basis in order to meet the standards of  
9 the injunction of which irreparable harm -- there's a whole  
10 host of reasons.

11           So while we understand what the Committee wanted to  
12 do. If they wanted to file an action, they could have. We  
13 don't expect them to have completed their investigation on all  
14 the types of claims they're looking at. But they've been aware  
15 of this Okada note for a couple of months. It would not have  
16 been difficult for them to file, as they have standing, a  
17 lawsuit to recover any. They asked us to issue a demand note,  
18 we did, and we got the answer.

19           So, Your Honor, I don't think there's a basis under  
20 105, the way it's being used here and the lack of evidentiary  
21 record to support it. And for those reasons, Your Honor, we  
22 would ask that Your Honor support the motion and other than the  
23 distributions that are being held in the registry, allow the  
24 distribution to be made to Mr. Okada.

25           THE COURT: Okay.

1 MR. POMERANTZ: Thank you, Your Honor.

2 THE COURT: All right. Other quick closings?

3 MR. CLEMENTE: Your Honor, I'll be very quick.

4 CLOSING ARGUMENT ON BEHALF OF THE COMMITTEE

5 MR. CLEMENTE: There's obviously a lot more that I  
6 could say, but I'll be respectful and be very quick.

7 First of all, Your Honor is the judge and you're the  
8 one that determines what the law is and what the duties  
9 ultimately are for this Debtor. Mr. Seery I think indicated in  
10 his testimony that, for what it's worth, he does not believe  
11 that there would be a viable claim for breach of fiduciary duty  
12 if Your Honor ordered the distribution to Mr. Okada be put in  
13 the Court registry.

14 I think the testimony was clear from Mr. Seery that  
15 Mr. Okada, at all times relevant, when all the things that  
16 happened that involved the Redeemer Committee, that involved  
17 Acis, that involved UBS, Mr. Okada was at least co-Chief  
18 Investment Officer and we all know he was co-founder of  
19 Highland. I think Your Honor's questions, and perhaps  
20 frustration with sort of trying to figure out some of the  
21 answers, show how interrelated all of these things are and the  
22 various capacities and roles that Mr. Okada had back at the  
23 time when all these different transactions occurred.

24 I think the testimony we heard is that Mr. Seery did  
25 a lot of work around why we should pay Mr. Okada, but almost no



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1 work around why we shouldn't pay Mr. Okada. And so I go back  
2 to what I said earlier, Your Honor, I think Mr. Okada is  
3 perfectly capable of coming into this court and arguing that  
4 once the monies that were put into this Court's registry should  
5 be distributed to him, he can come in and do that.

6 But I think for purposes of today, Your Honor has  
7 heard more than enough to come to the conclusion that the  
8 appropriate remedy here is to place the money within the  
9 registry of this Court. It satisfies the fiduciary duty of the  
10 Debtor and it protects the interest of Mr. Okada, who is free  
11 to come into this court and make whatever argument he so  
12 chooses as to his entitlement to those funds.

13 Unless Your Honor has any questions of me, I'll sit  
14 down.

15 THE COURT: Thank you.

16 MR. CLEMENTE: Thank you.

17 THE COURT: Anything else?

18 MR. POMERANTZ: Your Honor, in answer to you  
19 question, November 11 was the date that the fees were no longer  
20 payable to the Debtor in the Dynamic Fund.

21 THE COURT: November 11 post-petition.

22 MR. POMERANTZ: Correct.

23 THE COURT: I like being transparent and I -- and so  
24 I sometimes share my thoughts hoping that it will help. But  
25 I'm -- you all get why I'm fixated on this point? Maybe I'm

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1 sharing my thoughts when I don't have to. But the time line  
2 looks suspect, whether it should be or not, it looks maybe  
3 problematic. Do you see what I'm saying?

4 We had this fund that I understand never got to real  
5 scale and in spring 2019 we have a couple of big unrelated  
6 third-parties -- third-party investors issue redemptions and  
7 that makes it really not a very worthwhile fund, so maybe it  
8 should go into wind-down mode. Nevertheless, Highland has been  
9 continuing to get its management fee. I don't know how much  
10 management fee, but it's been getting a management fee until it  
11 files bankruptcy, and then, Oh, let's wind this sucker down.

12 Do you see what -- you know, I don't know. I mean  
13 again, a hearing for another day. But this is the kind of  
14 thing I get concerned about, and maybe kind of want to look  
15 into the bona fides of the decision making process to wind  
16 down, let's terminate this thing and make disbursements. And,  
17 you know, did we have any fingerprints of this on insiders that  
18 should make me troubled. I don't know. I mean if I'm going  
19 out on a lark here, just stop me.

20 MR. POMERANTZ: Well, look, Your Honor, I certainly  
21 understand why you're concerned. As you said at the first  
22 hearing, you have stuff in your head that you can't forget, and  
23 I understand. I wasn't around but I understand the history and  
24 especially the history with certainly similar things that may  
25 have happened in the Acis case.

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1           The facts are that Realdania made its redemption  
2 request on August 15, the fees that the -- August 15, but that  
3 the liquidation was the time where the management fees stopped,  
4 which incidentally were \$12,000 a month based upon the level of  
5 this spot.

6           THE COURT:   Okay.

7           MR. POMERANTZ:   So, Your Honor, I understand your  
8 concerns, however, what I would say is, you have Mr. Seery here  
9 answering your questions.   You have Mr. Seery who said he's  
10 conducted an thorough investigation.   At some point, and I'm --  
11 you know, obviously you brought up a couple of questions, at  
12 some point the creditors -- Your Honor has to accept that if  
13 the board has done a thorough analysis, and we're coming into  
14 this hearing today, and before we filed the motion, as Mr.  
15 Seery said, we crossed all our Ts and dotted all our Is.

16           We spent a lot of money collectively, the different  
17 firms that are involved, because we wanted to make sure it's  
18 the right thing.   We understood that coming to Your Honor  
19 asking to pay investors who are related parties, given the  
20 context of this case and given the Committee's opposition, was  
21 going to be a big challenge.   We thought it was the right thing  
22 to do, but we wanted to make sure Your Honor knows that the  
23 board actually did a thorough investigation, again, spearheaded  
24 by Mr. Seery, who is not just someone off the street, but as he  
25 testified, this is what he's done over the last 10-15 years.

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1           So I certainly understand Your Honor's concerns. Mr.  
2 Seery I think has testified about the thorough investigation,  
3 and that the 12,000 a month, that I think if he got back on the  
4 stand, he would testify that would be a breach of duty to the  
5 investors to continue on getting fees. There's an obligation  
6 at some point, when the redemptions happened, to either pay the  
7 redemptions, put the fund in liquidation, and that's what  
8 happened.

9           And just because it wasn't done by the board, it was  
10 done before, it was important, as I mentioned in my opening,  
11 and as Mr. Seery testified, he looked at that carefully and  
12 thoroughly. He didn't want to be embarrassed, we didn't want  
13 to be embarrassed coming in and not having those answers. So,  
14 Your Honor, this is a long way of saying I think at some point  
15 the board is entitled to the deference of business judgment if  
16 they can demonstrate that they've gone through the process  
17 necessary to earn the deference to business judgment, which I  
18 think Mr. Seery has done.

19           THE COURT: Okay. And while we're on the subject, I  
20 mean 12,000 a month was the management fee to Highland from  
21 Dynamic. What was the management fee from Argentina, do you  
22 have that off the top of your head?

23           MR. SEERY: It would have been in the same -- these  
24 are approximately --

25           THE COURT: The same range?

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1 MR. SEERY: -- the same neighborhood.

2 THE COURT: Okay.

3 MR. SEERY: That the meetings would be based upon  
4 fees.

5 THE COURT: Okay.

6 MR. SEERY: Or the redemptions (indiscernible)  
7 variable asset now (indiscernible).

8 THE COURT: Okay.

9 MR. SEERY: (indiscernible).

10 THE COURT: Okay. All right. Just a minute while I  
11 do some math.

12 (Pause in the proceedings.)

13 THE COURT: All right. I'm doing this math in my  
14 head. There's a \$7.4 million note receivable from HCM Services  
15 of which Okada is the 25 percent owner of.

16 MR. POMERANTZ: Your Honor, 7.4 is not the demand  
17 notes. Again, 985,000 is the demand notes. The rest of those  
18 notes are performing and not in the fall.

19 THE COURT: Okay. All right. With regard to the  
20 motion and the objection and the Committee there's been a lot  
21 of argument about 105 and what it permits the Court to do and  
22 what it doesn't as far as fashioning an equitable remedy here.  
23 Here I mean it's clear that this Debtor has receivables owed by  
24 these related parties, although they don't necessarily match up  
25 perfectly with the amount of disbursements that are owed by

1 these funds and of course the funds are separate legal entities  
2 than the Debtor. So I'm not glossing over that fact or  
3 ignoring that fact.

4 But I do think the Court has broad equitable powers  
5 to remedy -- to fashion remedies that preserve the status quo  
6 and I think it is appropriate here to order that most of this  
7 money, that most of the 8.6 million that would go to related  
8 investors in these three funds, be put into the registry of the  
9 court pending further motions, orders, adversary proceedings  
10 anyone wants to file to make a claim to that money. I said  
11 most of it.

12 I am going to order that with regard to the amount  
13 that would be payable to Mr. Okada, the 4.176 million, we will  
14 subtract from that the 1.3 million that represents the demand  
15 note receivable that the Debtor has so that I'm essentially  
16 doing an equitable offset at that point. So he can only be  
17 paid -- he should only be paid from the Dynamic Fund whatever  
18 4.176 million minus 1.3 million is, and the rest shall be put  
19 into the registry of the court. And everybody's rights are  
20 reserved on anything and everything with regarding to do tos  
21 and do froms.

22 I reserve the right to supplement in more detail in a  
23 written form of order to justify the Court's 105 action here.  
24 But, Mr. Pomerantz, I'd ask you to upload a form of order on  
25 this, please.

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1 MR. POMERANTZ: We'll be happy to, Your Honor. We'll  
2 circulate it to the Committee and Ms. Patel as well.

3 THE COURT: All right. Well, thank you all, and --

4 MR. CLEMENTE: Your Honor, but just to be clear  
5 though, the other amounts, correct, to HCM Services and CLO  
6 Holdco, would that be part of the order or what did Your Honor  
7 have in mind with respect to that?

8 THE COURT: Well --

9 MR. CLEMENTE: Because I believe those are to be  
10 deposited with the Court as well, yes.

11 THE COURT: -- all of -- everything gets deposited  
12 in the registry of the court, except Mr. Okada will get  
13 whatever the differential is of 4.176 minus 1.3. Okay?

14 MR. CLEMENTE: Thank you, Your Honor.

15 THE COURT: All right. Thank you.

16 COURT SECURITY OFFICER: All rise.

17 \*\*\*\*\*

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C E R T I F I C A T I O N

We, DIPTI PATEL, KAREN WATSON and TERRI STARKEY,  
court approved transcriber, certify that the foregoing is a  
correct transcript from the official electronic sound recording  
of the proceedings in the above-entitled matter, and to the  
best of my ability.

/s/ Dipti Patel

DIPTI PATEL

/s/ Karen Watson

KAREN WATSON

/s/ Terri Starkey

TERRI STARKEY

J&J COURT TRANSCRIBERS, INC.

DATE: March 6, 2020



## EXHIBIT 26

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

In Re: ) **Case No. 19-34054-sgj-11**  
) Chapter 11  
)   
HIGHLAND CAPITAL ) Dallas, Texas  
MANAGEMENT, L.P., ) Wednesday, December 16, 2020  
) 1:30 p.m. Docket  
Debtor. )   
) - MOTION FOR ORDER IMPOSING  
) TEMPORARY RESTRICTIONS [1528]  
) - DEBTOR'S EMERGENCY MOTION TO  
) QUASH SUBPOENA AND FOR ENTRY  
) OF PROTECTIVE ORDER [1564,  
) 1565]  
) - JAMES DONDERO'S MOTION FOR  
) ENTRY OF ORDER REQUIRING  
) NOTICE AND HEARING [1439]  
)

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

For the Debtor: Jeffrey N. Pomerantz  
PACHULSKI STANG ZIEHL & JONES, LLP  
10100 Santa Monica Blvd.,  
13th Floor  
Los Angeles, CA 90067-4003  
(310) 277-6910

For the Debtor: John A. Morris  
Gregory V. Demo  
PACHULSKI STANG ZIEHL & JONES, LLP  
780 Third Avenue, 34th Floor  
New York, NY 10017-2024  
(212) 561-7700

For the Official Committee of Unsecured Creditors: Matthew A. Clemente  
SIDLEY AUSTIN, LLP  
One South Dearborn Street  
Chicago, IL 60603  
(312) 853-7539

1 APPEARANCES, cont'd.:

2 For James Dondero: D. Michael Lynn  
3 Bryan C. Assink  
4 BONDS ELLIS EPPICH SCHAFFER  
5 JONES, LLP  
6 420 Throckmorton Street,  
7 Suite 1000  
8 Fort Worth, TX 76102  
9 (817) 405-6900

10 For the Issuer Group: James E. Bain  
11 JONES WALKER, LLP  
12 811 Main Street, Suite 2900  
13 Houston, TX 77002  
14 (713) 437-1820

15 For the NexPoint Parties: James A. Wright, III  
16 K&L GATES  
17 State Street Financial Center  
18 One Lincoln Street  
19 Boston, MA 02111  
20 (617) 261-3193

21 For Highland CLO Funding,  
22 Ltd.: Rebecca Matsumura  
23 KING & SPALDING, LLP  
24 500 West 2nd Street, Suite 1800  
25 Austin, TX 78701  
(512) 457-2024

Recorded by: Michael F. Edmond, Sr.  
UNITED STATES BANKRUPTCY COURT  
1100 Commerce Street, 12th Floor  
Dallas, TX 75242  
(214) 753-2062

Transcribed by: Kathy Rehling  
311 Paradise Cove  
Shady Shores, TX 76208  
(972) 786-3063

Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

1 DALLAS, TEXAS - DECEMBER 16, 2020 - 1:35 P.M.

2 THE COURT: All right. This is Judge Jernigan. We  
3 have settings in Highland. We have -- I guess the very first  
4 thing that we had set today was a motion of Dondero, Mr.  
5 Dondero wanting some sort of revised procedures for "future  
6 estate transactions occurring outside the ordinary course of  
7 business." Then, related to that, we received the other day  
8 -- I'm not showing it on the calendar, I'm not sure if that  
9 means it's moot now or not, but we had a motion for protective  
10 order and a motion to quash with regard to certain depositions  
11 that Mr. Dondero wanted in connection with his motion. The  
12 Debtor filed that motion to quash. It was to quash a  
13 deposition of Mr. Dubel, Mr. Nelms, Mr. Sevilla, and Mr.  
14 Caruso. And then we have the CLO Motion, what I'm calling the  
15 CLO Motion, of --

16 (Interruption.)

17 THE COURT: Okay. Let's --

18 MR. POMERANTZ: Your Honor, this is Jeff Pomerantz.  
19 The first two motions have been resolved. And after Your  
20 Honor takes appearances, I'm happy to inform the Court of the  
21 proposed resolution, and there's an agreed order that we would  
22 upload after the hearing.

23 THE COURT: Okay. Well, that is certainly music to  
24 my ears. All right. So I was just trying to lay out the  
25 program for what I thought was set, potentially three motions,

1 one of which was a deposition dispute.

2 All right. So let's go ahead and get appearances. Mr.  
3 Pomerantz, you're obviously appearing for the Debtor team.

4 MR. POMERANTZ: Yes. Good morning, Your Honor. Or  
5 good afternoon, Your Honor. Jeff Pomerantz; Pachulski Stang  
6 Ziehl & Jones. Also on the video with me today are John  
7 Morris and Greg Demo. They will be handling the CLO Motion,  
8 and I will be reporting to the Court on the resolution of Mr.  
9 Dondero's motion and our corollary discovery motions.

10 THE COURT: Okay. All right. Well, why don't I take  
11 an appearance from Mr. Dondero next. Mr. Lynn, I see you  
12 there.

13 MR. LYNN: Yes, Your Honor. I am here with Bryan  
14 Assink, who will replace me after the preliminaries when our  
15 business is done. Other than concurring with Mr. Pomerantz, I  
16 wanted to advise Your Honor that in the last 30 minutes we  
17 filed an additional motion where we're seeking a clarification  
18 with respect to the temporary restraining order that the Court  
19 entered last week.

20 THE COURT: All right. Well, I did see an email from  
21 my courtroom deputy right before walking in about that motion,  
22 and so that's why I was a little surprised and said "Music to  
23 my ears" that there was an agreed order on the Dondero  
24 motions. But I'll get the details --

25 MR. LYNN: Well, we're --

1 THE COURT: I'll get the details about that in a  
2 minute. Let me go ahead and get the other appearances.

3 For the Movants on what I've called the CLO Motion, who do  
4 we have appearing?

5 MR. WRIGHT: Good afternoon, Your Honor. It's James  
6 Wright of K&L Gates for the -- I guess I'll call them the  
7 Movant for this motion.

8 THE COURT: Yes. Sometimes you're referred to as the  
9 Advisors and the Funds and -- but Movants on Docket Entry  
10 1528.

11 All right. For the Committee, I know you have weighed in  
12 on a couple of these motions. Who do we have?

13 MR. CLEMENTE: Good afternoon, Your Honor. Matt  
14 Clemente with Sidley Austin on behalf of the Committee.

15 THE COURT: All right. Well, we have a lot of folks  
16 on the phone. I think I've covered everybody who filed a  
17 pleading for today. Is there anyone else who would like to  
18 appear? I'd really like to restrict it only to those who have  
19 filed pleadings today.

20 MS. MATSUMURA: This is Rebecca Matsumura from King &  
21 Spalding representing Highland CLO Funding, Ltd. I don't  
22 expect I'll be weighing in today, but there are a couple  
23 issues that I may say a sentence on, so I want to go ahead and  
24 make my appearance now.

25 THE COURT: All right. Thank you. Anyone else?

1 MR. BAIN: Yes, Your Honor. Joseph Bain; Jones  
2 Walker; on behalf of the CLO Issuers.

3 THE COURT: All right.

4 MR. BAIN: And Your Honor, if we may make certain  
5 comments at the requisite time, we'd appreciate it.

6 THE COURT: All right. Thank you. Anyone else?

7 All right. Well, Mr. Pomerantz, let's hear about the  
8 agreements you have on the Dondero-related motions.

9 MR. POMERANTZ: Happy to, Your Honor. And yes, Mr.  
10 Lynn is correct, we saw also an emergency motion that came  
11 through that I'll have a couple of comments at the end of my  
12 presentation.

13 So, as I mentioned before, Your Honor, I'm pleased to  
14 report that with respect to the two motions that Your Honor  
15 scheduled for today's hearing, we have an agreement with Mr.  
16 Dondero. One was the motion of Mr. Dondero requiring  
17 transactions out of the ordinary course to be brought before  
18 this Court. The second was the Debtor's motion to quash a  
19 series of subpoenas that had been issued in the last two days,  
20 requiring board members and others to testify.

21 As part of the agreement, we have agreed with Mr. Dondero  
22 that his motion, which is presently set for today, shall be  
23 continued to January 4th, which is the same date set as the  
24 continued hearing on the preliminary injunction relating to  
25 the TRO that Your Honor had entered last week.

1 As part of that agreement, the Debtor has agreed that it  
2 will provide Mr. Dondero with three business days' notice  
3 before selling any non-security assets from any managed funds  
4 accounts through and including January 13th, which is the date  
5 set for confirmation.

6 While, as the Court is aware, the Debtor doesn't believe  
7 that any notice, opportunity for hearing, or an order from the  
8 Court is required in connection with such transactions, as the  
9 Debtor does not have any current plans to sell non-security  
10 assets from managed funds before confirmation, it was willing  
11 to agree to the notice requirement as essentially a way of  
12 resolving the motion before Your Honor today and continuing  
13 until the 4th.

14 As part of the agreement as well, Your Honor, the parties  
15 have agreed that there will be no further discovery in  
16 connection with the motion that is set. That'll be no  
17 additional discovery by Mr. Dondero, so he is withdrawing the  
18 subpoenas as it relates to this motion, and there will be no  
19 further discovery as -- by the Debtor. As Your Honor, I  
20 think, is aware, there were depositions conducted of both Mr.  
21 Seery and Mr. Dondero on Monday in connection with this  
22 motion, but the discovery will not happen over the next couple  
23 of weeks.

24 Mr. Dondero wanted to make sure, and the Debtor didn't  
25 have any opposition, that that agreement with respect to no



1 discovery only relates to the pending motion before the Court.  
2 And in connection with any other matters relating to this  
3 bankruptcy case, Mr. Dondero would reserve the right to pursue  
4 discovery, and of course the Debtors would reserve the right  
5 to challenge discovery if we believed it was inappropriate or  
6 unduly burdensome.

7 With respect to the motion that was just filed, Your  
8 Honor, we had a chance to briefly review it. We haven't had a  
9 chance to discuss it with the board. In any event, we don't  
10 think there's an emergency. Mr. Dondero wants the opportunity  
11 to approach and communicate with the board. I've told Mr.  
12 Lynn that communications regarding the plan are to go through  
13 Mr. Seery. Mr. Seery is the Debtor's chief executive officer.  
14 He's the chief restructuring officer. And at this point, the  
15 board doesn't see a reason or have a desire to meet with Mr.  
16 Dondero to talk about his plan, but, again, would be happy to  
17 receive any written communications that Mr. Dondero has.

18 Mr. Dondero has sought to modify the TRO to allow him to  
19 speak to the board. Again, if the board agreed to speak with  
20 Mr. Dondero, that wouldn't violate the TRO, provided that  
21 counsel would be present. But at this point, the board has  
22 decided that it would be inappropriate and not a good use of  
23 anyone's time to have that communication and that Mr. Dondero  
24 should continue to communicate through Mr. Seery, the Debtor's  
25 chief executive officer.

1           If Your Honor, after reading the motion and hearing my  
2       comments, and I'm sure Judge Lynn's comments that he will make  
3       to Your Honor, Your Honor wants to set it for hearing, we  
4       would submit, Your Honor, there's no emergency and that a  
5       hearing could be set next week, but we would think Your Honor  
6       might be able to dispose of the motion just on the papers and  
7       the limited argument that would go on today.

8           THE COURT: All right.

9           MR. POMERANTZ: Thank you, Your Honor.

10          THE COURT: All right. Mr. Lynn, first, could you  
11       confirm the terms of the agreed order that Mr. Pomerantz just  
12       announced are consistent with what you and your client  
13       believed was negotiated?

14          THE CLERK: He's on mute.

15          THE COURT: You're on mute, sir.

16          MR. LYNN: Mr. Pomerantz has correctly stated the  
17       agreement of the parties. I am pleased to advise Your Honor  
18       that I expect that we will withdraw the motion that is  
19       presently pending to be heard on January 4th, since all we  
20       were asking for was notice until confirmation date. If those  
21       sales are going to take place before then, we don't have a  
22       problem any longer with the pre-confirmation activity of Mr.  
23       Seery.

24          With regard to the motion that we filed requesting that  
25       the temporary restraining order be modified, we would point

1 out, respectfully, that the independent board is the board of  
2 directors of Strand Advisors. Strand Advisors belongs to Mr.  
3 Dondero. It is not unreasonable for the sole stockholder of  
4 Strand Advisors to ask the board questions or present thoughts  
5 to the board or ask its advice. Mr. Seery, on the other hand,  
6 while being a member of the board of Strand, is the chief  
7 executive officer and the chief restructuring officer of  
8 Highland, which is not the same as Strand.

9 Furthermore, Your Honor, Mr. Dondero has been attempting  
10 for several months to negotiate an arrangement by which the  
11 Debtor can continue as a going concern. It is his desire to  
12 discuss further with the board as a whole what he can do in  
13 that regard. I think the Court, by directing him originally  
14 to participate in the mediation that took place in September,  
15 expected him to do so. He has attempted to do so. And while  
16 he has not gotten a response from the Creditors' Committee  
17 that is definitive, he has at least caught the interest of Mr.  
18 Seery, though that interest may have died for a variety of  
19 reasons in recent weeks.

20 And by the way, next week is fine with us. We're not in a  
21 hurry beyond that if the Court feels further discussion would  
22 be useful.

23 MR. POMERANTZ: Your Honor, just a couple of points  
24 in response.

25 Mr. Dondero has the right to request an audience with the

1 board. He has requested the audience with the board. The  
2 board has considered it and decided not to communicate in that  
3 fashion with Mr. Dondero at this time. There is nothing that  
4 Your Honor can do in the TRO that would change that, other  
5 than ordering the board to speak with Mr. Dondero, which I  
6 highly doubt Your Honor would do.

7 Having said that, this board in general and Mr. Seery in  
8 particular have been very supportive of an overall resolution  
9 to this case, not only with the creditors, but with Mr.  
10 Dondero. Mr. Seery has spent tens if not hundreds of hours  
11 over the last several months working with Mr. Dondero to try  
12 to get him in a position to present something that would have  
13 traction with the Unsecured Creditors. Unfortunately, that  
14 hasn't occurred. We understand there have been communications  
15 between Mr. Lynn and Mr. Clemente. And if there is any hope  
16 of a plan and any traction with the creditors, this Debtor in  
17 general and Mr. Seery in particular stands ready, willing, and  
18 able to do anything within the Debtor's power to help that  
19 out.

20 So, it's not really the Debtor standing in the way. It's  
21 an economic agreement ultimately that needs to be reached with  
22 Mr. Clemente and his constituents and Mr. Lynn. And if that  
23 can be reached, we will be the first to jump on that bandwagon  
24 and do everything humanly possible to have that occur.

25 Thank you, Your Honor.

12

1 THE COURT: All right. Well, again, I've not read  
2 the motion. I've just seen an email that I have this motion.  
3 I'm a little bit confused. I don't want to spend too long on  
4 this because we have another motion to get to. But I'm a  
5 little bit confused on how Dondero wants the TRO to be  
6 modified. If he has the right already to request an audience  
7 of the board, what is it that is problematic about the TRO  
8 that he wants modified?

9 THE CLERK: He's on mute.

10 THE COURT: You're on mute.

11 MR. LYNN: Sorry, Your Honor. As I told you before,  
12 you must forgive me, my command of technology is not great.

13 In response, I would say that I question whether it is  
14 appropriate, in advance of a meeting with the board of his  
15 company, that what he wants to talk about should be screened.  
16 And that is what has occurred in our effort to meet by  
17 telephone with the board.

18 Any such meeting would, of course, be subject to the  
19 restraints that are included in the temporary restraining  
20 order, in that both Mr. Pomerantz or his designee and I would  
21 participate in any such discussion. I respectfully submit  
22 Strand is his. Nobody may like that, but it is his, and he  
23 ought to be able to talk to his own board.

24 THE COURT: Is this about having a conversation  
25 without the Committee's involvement? I just don't -- hmm. I

1 just need to see the motion.

2 Mr. Clemente, anything you want to add at this juncture?

3 Have you even reviewed the motion yet?

4 MR. CLEMENTE: Your Honor, I apologize. I haven't  
5 actually even seen the motion. And so I have no comment on  
6 it, Your Honor. I apologize for not having been able to look  
7 at it.

8 THE COURT: Okay. Well, what about the agreed order  
9 that's been announced? Any comment on that?

10 MR. CLEMENTE: Your Honor, we support the resolution  
11 that Mr. Pomerantz announced on the record.

12 THE COURT: Okay. All right. Well, I assume there's  
13 nothing further, then, on the Dondero motions that were  
14 scheduled today?

15 All right. So I will happily accept the agreed order that  
16 has been announced. For now, we will continue the Dondero  
17 motion that was Docket Entry No. 1439 to January 4th, when the  
18 preliminary injunction hearing is set. And we -- I understand  
19 there are going to be no more discovery requests in connection  
20 with these matters that were set today.

21 And I will review the motion that Mr. Dondero has filed  
22 shortly before today's hearing in chambers later, and I will  
23 have my courtroom deputy communicate to the lawyers whether I  
24 see fit to set it for an emergency hearing next week or rule  
25 on the pleadings or set it for January 4th. Those are, I

14

1 guess, the three possibilities I can think of that I might  
2 decide upon.

3 So, again, I'm not making any ruling at all on a motion I  
4 haven't read yet. So I'll -- the courtroom deputy will let  
5 you all know, if not later today, tomorrow. Probably  
6 tomorrow, because I have a confirmation hearing set later  
7 today in another case.

8 All right. So, thank you all for working these issues  
9 out. And Mr. Pomerantz, Mr. Dondero -- or, excuse me, Mr.  
10 Lynn, anything further on the Dondero disputes?

11 MR. POMERANTZ: Nothing from the Debtor, Your Honor.

12 MR. LYNN: Your Honor, nothing from Mr. Dondero. May  
13 I be excused?

14 THE COURT: Is anyone anticipating needing Mr.  
15 Dondero's counsel for the other matter? All right. If not,  
16 then I certainly have no problem with you dropping off the  
17 line, Mr. Lynn. Thank you.

18 MR. LYNN: Thank you, Your Honor.

19 THE COURT: Okay. All right. So let's turn next to  
20 the CLO Motion. I take it there are no agreements on this  
21 one?

22 MR. POMERANTZ: There are not, Your Honor.

23 MR. WRIGHT: There are not, Your Honor. I can  
24 confirm that.

25 THE COURT: All right. Mr. Wright, do you have

15

1 anything you want to say as far as an opening statement before  
2 we go to the evidence?

3 MR. WRIGHT: I don't, Your Honor. My intention, if  
4 it's okay with you, you asked me to bring a witness, so I do  
5 have Mr. Norris from my client, and I was going to just remind  
6 the Court who I am and state the name of all of my Movants,  
7 and then I was going to move directly to put him on the stand  
8 and go through a brief direct.

9 THE COURT: All right. I think I heard Mr. Morris is  
10 going to handle this phase of the hearing.

11 MR. DEMO: And Your Honor, this is Greg Demo from  
12 Pachulski on behalf of the Debtor.

13 THE COURT: Oh, okay.

14 MR. DEMO: We would like to make a brief opening  
15 statement before we have witnesses, if that's all right with  
16 Your Honor.

17 THE COURT: All right. I'm fine with that. So, --

18 MR. DEMO: All right.

19 THE COURT: -- go ahead.

20 MR. DEMO: All right. Well, thank you, Your Honor.  
21 Again, Greg Demo; Pachulski Stang; on behalf of the Debtor.

22 We are here today on what really amounts to the third of  
23 three motions that deal with Mr. Dondero's attempts, either  
24 directly or through a proxy, to transfer control away from the  
25 Debtor and back to Mr. Dondero.



1       The current motion is filed by NexPoint Capital and  
2 Highland Capital Management Fund Advisors and three of their  
3 managed funds: Highland Income Fund, NexPoint Capital, and  
4 NexPoint Strategic Opportunities Funds.

5       Mr. Dondero owns and controls NexPoint Capital and  
6 Highland Capital Management Fund Advisors. While both  
7 NexPoint Capital and Highland Capital Management Fund Advisors  
8 are governed by boards, the boards have no investment  
9 authority with respect to the funds they manage, nor was the  
10 boards' approval necessary to file the motion, or obtained.

11       Mr. Dondero is the sole portfolio manager for NexPoint  
12 Strategic Opportunities Fund and Highland Income Fund. Mr.  
13 Dondero is one of three portfolio managers for NexPoint  
14 Capital. Mr. Dondero's decisions are not subject to  
15 oversight.

16       The Movants disclosed these facts in their recent SEC  
17 filings, and there can be no dispute that Mr. Dondero is the  
18 controlling figure behind the Movants in the relief being  
19 sought in the motion which seeks to impede the Debtor's  
20 efforts to exercise its rights as a CLO manager.

21       The fact that this motion was even filed is quite  
22 surprising, since on December 7th the Debtor filed a complaint  
23 and TRO based upon Mr. Dondero's unlawful efforts to frustrate  
24 the Debtor's efforts to sell assets from the very CLOs that  
25 are the subject of this motion.

1 The Court granted the TRO on December 10th. Mr. Dondero  
2 also filed a motion seeking similar relief in November, which  
3 has now been adjourned to January 4th.

4 The Movants are essentially now seeking an order from this  
5 Court enjoining the Debtor from exercising its rights as a CLO  
6 manager and requiring the Debtor to seek the Movants' and Mr.  
7 Dondero's permission to fulfill its obligations as a manager  
8 for the CLOs.

9 The Movants, however, do not come right out and say this,  
10 and instead couch the motion as seeking to simply pause the  
11 CLOs' asset sales while the Movants and the Debtor engage in  
12 discussions regarding the future of the CLOs' management.

13 In the motion, the Movants also argue the Debtor has made  
14 decisions detrimental to the interests of the preference  
15 shareholders because the Debtor is trying to monetize its  
16 assets in a manner inconsistent with the preference shares'  
17 objectives.

18 The Movants simply mischaracterize the facts, the parties'  
19 respective rights under contracts, and the law.

20 First, to the extent the Movants hold interests, they hold  
21 only preference shares in the CLOs and are minority investors  
22 in the preference shares of 12 of the 15 CLOs at issue. In  
23 one third of the CLOs, the Movants' interests sit behind  
24 senior debt which must be paid first.

25 Notably, Your Honor, no other investors in the CLOs are

1 here or have expressed support for the Movants' position.

2 Second, the Movants simply have no right under the  
3 contracts governing the CLOs to the relief they are  
4 requesting. The CLOs are governed by a series of agreements  
5 which were agreed to long ago and dictate the rights of all  
6 investors of the CLOs. The enforceability of those agreements  
7 is relied on by all investors, not just the Movants.

8 Under these agreements, investment discretion is given to  
9 the CLOs' manager -- in this case, the Debtor -- and no  
10 investor has the right to direct the CLO manager. The manager  
11 was chosen to manage the CLOs' assets. No individual investor  
12 was chosen to manage the CLOs' assets.

13 Simply said, there will be no evidence that the Movants  
14 have the right to do what they're trying to do, and there will  
15 be no evidence that the Movants' preferences with respect to  
16 the CLOs' assets is in line with that of the other investors  
17 in the CLOs.

18 Under the relevant agreements, if an investor is not happy  
19 with a manager's performance, the investor's rights are  
20 generally limited to replacing the manager. The investors  
21 here -- excuse me, the Movants here -- have not done that and  
22 cannot do that. Under the agreements, replacement requires at  
23 least the majority of the preference shares that are not  
24 affiliates of the managers. In 12 of the 15 CLOs, the Movants  
25 hold a substantial minority interest position. They are not

1 the majority. In the three CLOs in which they are the  
2 majority, the Movants still cannot replace the Debtor as the  
3 investment manager because they are the Debtor's affiliates.

4 It is indisputable that, prior to January 9th, when Mr.  
5 Dondero was removed from control of the Debtor, that the  
6 Debtor, NexPoint Advisors, Highland Capital Management Fund  
7 Advisors, and the three funds were the Debtor's affiliates  
8 because of Mr. Dondero's common control.

9 After January 9th, where the Court removed Mr. Dondero  
10 from control of the Debtor, the Debtor is arguably, under the  
11 documents, not an affiliate. However, Your Honor, the Movants  
12 have disclosed in their recent proxy statements filed in 2020  
13 that they still consider themselves the Debtor's affiliate,  
14 and they should be bound by that statement. The Movants, by  
15 virtue of Mr. Dondero's being removed from control of the  
16 Debtor, should not be able to use that removal to reassert  
17 control over the CLOs that were taken away from Mr. Dondero  
18 when he was removed in January 2020.

19 The Debtor believes that additional briefing may be needed  
20 on this issue, and that a ruling specifically on this issue  
21 and the parties' relative rights under the CLO management  
22 agreements may be needed. The Debtor reserves its right to  
23 brief this issue and to bring it before this Court, either as  
24 a declaratory judgment or any other procedurally-appropriate  
25 motion.

1           Because the Debtor -- excuse me. The Movants have no  
2 right to the relief requested. They argue that the relief is  
3 justified because of the mismatch between the investors'  
4 timelines and the Movants'. This is not true. The Movants  
5 cite to three transactions to justify their statement in the  
6 motion: SSP, OmniMax, and certain recent transactions.

7           The recent transactions were the attempted sales of two  
8 public equities immediately before Thanksgiving that Mr.  
9 Dondero interfered with. You'll hear testimony from Mr. Seery  
10 about each of these transactions and how each was in the best  
11 interest of the CLOs.

12           First, SSP. SSP is a steel business that was suffering  
13 for a number of reasons. The Debtor's investment team  
14 believed SSP should be sold since 2019. The Debtor received  
15 multiple offers for SSP, the Debtor evaluated these offers,  
16 and the Debtor choose the one that was the best. The SSP sale  
17 closed in early November.

18           Notably, Your Honor, none of the CLOs held an equity  
19 interest in SSP, its parent, or in Trussway. Instead, they  
20 held debt, and they got exactly what they bargained for,  
21 repayment of their debt obligations in full.

22           OmniMax, Your Honor, is the second one. It is a  
23 fabricator of building materials. The CLOs and the Movants  
24 held an interest in OmniMax debt which they have been trying  
25 to refinance or equitize since 2019. That deal was intended

1 to include the Movants, but instead of working with the  
2 Debtor, Mr. Dondero held out and used the threat of litigation  
3 against OmniMax to secure a higher price for the Movants, to  
4 the detriment of the CLOs.

5 As Mr. Seery will testify, these two transactions were all  
6 about maximizing value and have nothing to do with investment  
7 timelines.

8 Finally, Your Honor, the Movants reference the  
9 Thanksgiving transactions. These transactions were discussed  
10 in the context of Mr. Dondero's TRO. Mr. Seery directed  
11 Debtor personnel, on the advice of his investment team, to  
12 sell these securities. Mr. Dondero blocked those trades. Now  
13 the Movants argue that the reason those trades were blocked  
14 was because of a mismatch between the Movants' and the  
15 Debtor's investment timelines. That is not the case. Mr.  
16 Seery will testify as to these trades. The Debtor is an  
17 investment manager and appreciates that its decisions with  
18 respect to how it manages its assets are -- is a judgment  
19 call. The evidence, however, will show that the Debtor at all  
20 times exercised that judgment in good faith based on all  
21 available information.

22 The Movants may disagree with the Debtor's judgment, Your  
23 Honor, but that is irrelevant. The Movants have no right to  
24 interfere with the Debtor's management of the CLOs. There is  
25 simply no statutory or contractual basis for this, not under

1 Section 363 and not under the CLO agreements.

2 Finally, Your Honor, -- I guess not finally. There's one  
3 more point I want to make. But Your Honor, this -- what we're  
4 here on today is notably similar to the Acis bankruptcy that  
5 Your Honor noted last time we were here last week. In that  
6 bankruptcy, HCLOF tried to direct the collateral manager to  
7 take certain actions that HCLOF thought were in the best  
8 interest of the CLOs. In this case, the Movants, through Mr.  
9 Dondero, are trying to file an action that functionally seeks  
10 to direct the Debtor to take interests that the Movants  
11 believe are in their best interest. There is substantial  
12 overlap between the litigation in Acis and the litigation  
13 here.

14 Finally, Your Honor, the Debtor has been in discussions  
15 with the CLOs' counsel on this issue. And the Debtor has been  
16 informed that the CLOs' position is that the Debtor's ability  
17 to operate under the management agreements should not be  
18 interfered with, not by the Movants or not by any other party.

19 Thank you, Your Honor. With that, I will turn it over to  
20 Mr. Norris. Or, I'm sorry, Mr. Wright.

21 THE COURT: All right. Mr. Wright, you may call your  
22 witness.

23 MR. WRIGHT: All right, Your Honor. Dustin Norris  
24 should be -- should be dialed in and should be available on  
25 screens.

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1 THE COURT: Okay. I'm going to --

2 MR. WRIGHT: I'll pause and have him confirm that.

3 THE COURT: I'm going to ask you, Mr. Wright, to  
4 speak up or closer to your device. I didn't hear the name of  
5 your witness.

6 MR. WRIGHT: Sure. Sorry. It's Dustin Norris. I --  
7 last time, you were having trouble hearing me, and so I'm  
8 trying a different device this time. I actually followed the  
9 instructions that I found very helpful, so I'm trying my phone  
10 in hopes that it will work better.

11 THE COURT: All right.

12 MR. WRIGHT: But, yeah, it's Dustin Norris. D-U-S-T-  
13 I-N, N-O-R-R -- N-O-R-R-I-S.

14 THE COURT: All right. Mr. Norris, can you say  
15 "Testing one two" so we pick up your video?

16 MR. NORRIS: Testing one two.

17 THE COURT: All right.

18 MR. NORRIS: Testing one two.

19 THE COURT: All right. Please raise your right hand.

20 DUSTIN NORRIS, MOVANTS' WITNESS, SWORN

21 THE COURT: All right. Mr. Wright, you may proceed.

22 MR. WRIGHT: Thank you, Your Honor.

23 DIRECT EXAMINATION

24 BY MR. WRIGHT:

25 Q Mr. Norris, you're employed by NexPoint Advisors?



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1 A I am. That's correct.

2 Q And what is your title and role there?

3 A Yeah. I am the executive vice president of NexPoint  
4 Advisors. In that role, I oversee business development,  
5 marketing, sales, investor relations. And as far as the funds  
6 advised by the advisor, I'm the liaison with the independent  
7 board on the business side.

8 Q Thank you. Do you also have a role for Highland Capital  
9 Management Fund Advisors?

10 A I do. I'm also the same executive vice president and  
11 fulfill that same role as it pertains to business development,  
12 sales, investor relations. And in both, I'm also working on  
13 product development. So, launching, developing new products  
14 and investment funds.

15 Q Do you also have a role for Highland Income Fund, NexPoint  
16 Strategic Opportunities Fund, and NexPoint Capital, Inc.?

17 A I do. I'm also executive vice president for each of those  
18 funds.

19 Q Thank you. Have you ever served on the boards of these  
20 three funds?

21 A I have. I've served as the interested trustee, sole  
22 interested trustee for each of these funds. I'm no longer the  
23 board member or interested trustee, but still serve as an  
24 officer, executive vice president, for each fund.

25 Q At times, I'm going to refer to NexPoint Advisors, LP and

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1 Highland Capital Management Fund Advisors, LP simply as the  
2 Advisors, to avoid having to keep saying their long names.  
3 And similarly with the three funds that are part of the  
4 motion, I may just call them the Funds.

5 Can you explain the relationship between the Advisors and  
6 the Funds, briefly?

7 A Yeah. So, each of these are investment companies that are  
8 registered under the Investment Company Act of 1940. So, with  
9 that comes a unique relationship between an investment advisor  
10 and the funds themselves. The Funds don't have employees.  
11 They rely on the investment advisor and investment advisor  
12 employees. And between the Funds and the Advisors is an  
13 investment advisory agreement. And the Funds themselves are  
14 also overseen by an independent board, and that's by statute  
15 by the 1940 Act.

16 Q Okay. And just to be clear, when you said that these are  
17 -- entities are investment companies, you meant that the three  
18 Funds are investment companies?

19 A Correct. Correct. The three Funds are investment  
20 companies. The investment advisors are not investment  
21 companies.

22 Q Thank you. Can you explain the role of the board for the  
23 Funds?

24 A Yeah. So, as prescribed by the Investment Company Act of  
25 1940, there are certain obligations related to an investment

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1 company, and one of those is they must be overseen by an  
2 independent board. And the independent board has a  
3 responsibility to oversee the -- certain material agreements,  
4 including the advisory agreement. And we meet regularly with  
5 the boards. They overseas certain processes and, again, all  
6 material contracts. And the board is, by Section 15(c) of the  
7 1940 Act, required by law to annually review the capabilities  
8 of the Advisor and to either approve or reject the advisory  
9 contracts. So, each year, those contracts are renewed by the  
10 independent board.

11 There are certain obligations of the Fund and operations  
12 that are delegated responsibility to the investment advisors.  
13 That includes portfolio management and investment decisions.  
14 But all those are overseen by the board.

15 Q Okay. And are the boards involved in the day-to-day  
16 operations of the Funds?

17 A They're not.

18 Q Okay. And do you know who the members of the boards of  
19 these three Funds are?

20 A I do.

21 Q Could you share that with us?

22 A Yeah. So, the -- there is one interested trustee of each  
23 board, and that's John Honis. And then for the Highland  
24 Income Fund and the NexPoint Strategic Opportunities Fund --  
25 sorry, for NexPoint -- for Highland Income Fund and NexPoint

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1 Capital, we have the same three disinterested or independent  
2 trustees, and that's Bryan Ward, Dr. Bob Froehlich, and Ethan  
3 Powell. And for NexPoint Strategic Opportunities Fund, we  
4 have the same four trustees, one interested, three  
5 independent, but there's another fourth independent trustee,  
6 Ed Constantino.

7 Q And when you refer to independent trustees, do you mean  
8 independent for purposes of the Investment Company Act of  
9 1940, as amended?

10 A That's correct. They, by statute, they are independent  
11 trustees. They also have an independent legal counsel. Stacy  
12 Louizos represents them from Blank Rome. And also two of  
13 these Funds are listed on the New York Stock Exchange, and the  
14 New York Stock Exchange has various independence requirements  
15 that each independent director has met.

16 Q Thank you. And which are the two Funds that are listed on  
17 NYSE?

18 A The Highland Income Fund and the NexPoint Strategic  
19 Opportunities Fund are both NYSE-listed.

20 Q And I know you probably haven't memorized everybody who  
21 invests in the Funds, but can you give us a general idea of  
22 who invests in these Funds?

23 A Certainly. I definitely have not memorized them. There  
24 are thousands of individual investors in each of these Funds.  
25 Part of my role overseeing investor relations and sales, I do

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1 talk to a lot of those investors. But the majority of the  
2 investors in each of these Funds are individual investors.

3 As '40 Act Funds, almost anybody with a brokerage account  
4 can buy them. They have tickers, particularly the Funds that  
5 are listed. Closed-end funds. And so, with that, it is mom-  
6 and-pop investors. It's retail investors, including myself.  
7 I've allocated my 401(k) to these funds, the majority of my  
8 401(k) to these funds. But there are also institutional  
9 investors. There's hedge funds. There's ETFs. There are  
10 large high-net-worth individuals. But the majority of it is  
11 individual investors that have invested through their  
12 brokerage firms, be it Wells Fargo, Morgan Stanley, or Cetera.  
13 These are -- these are -- these are the individual investors.

14 Q Thank you. Does Mr. Dondero have investments in the  
15 Funds? Do you know?

16 A He does. He's invested in each of the Funds.

17 Q Does he have a majority investment in any of the Funds?

18 A He does not have a majority investment in any of the  
19 Funds.

20 Q Thank you. Does Mr. Dondero have a control relationship  
21 with the two Advisors?

22 A Yes. He does. With the Advisors.

23 Q And does he have a control relationship with the Funds?

24 A As it pertains to portfolio management, he is a portfolio  
25 manager of each Fund. But as discussed, as I mentioned, the

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1 independent board on an annual basis has the ability to  
2 terminate or renew our advisory contracts, and that -- that  
3 dynamic removes the control, overall control, of the Funds in  
4 that regard.

5 Q Are you familiar with the motion that the Court I think  
6 has accurately referred to as the CLO Motion that was filed by  
7 the two Advisors and the three Funds?

8 A Yes. I am familiar with it.

9 Q And I'm going to ask you a question now that I think is of  
10 interest to the Court, based on the last time I was in front  
11 of Judge Jernigan. Were any employees of the Debtor involved  
12 in deciding to bring this motion or in preparing the motion?

13 A No. None of the HCMLP employees, to my knowledge, were  
14 involved in preparing or deciding to bring the motion.

15 Q Okay. And you investigated who was involved in preparing  
16 the motion, so your knowledge is pretty good on this point?

17 A Correct. I have. And none were involved, based on that  
18 investigation.

19 Q (garbled) involved in deciding to bring a motion,  
20 preparing it, other than outside counsel and my firm?

21 A Yeah. So, the initial cause for concern was raised by Mr.  
22 Dondero himself to our legal -- internal legal team and  
23 compliance team. And working together with them, myself, and  
24 outside counsel, and senior management of Highland Capital  
25 Management Fund Advisors, including Joe Sowin, we prepared the

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1 order. Or, sorry, not the order, the motion.

2 Q All right. Thank you. Were the boards of the three Funds  
3 involved at all with bringing the motion?

4 A They were not involved in the preparation of the motion  
5 itself. They were aware and supportive, but they did not  
6 prepare the motion.

7 Q You provided a (audio gap), correct?

8 A Sorry. You did cut out there. I didn't hear the  
9 question.

10 Q I'll try again. You provided a declaration (garbled)  
11 motion, correct?

12 A I did, yes.

13 Q And there are two exhibits to your declaration. There's  
14 an Exhibit A and an Exhibit B.

15 A Correct.

16 Q Exhibit A, does this reflect the current repayment status  
17 of the various CLOs as we -- as you understand it to be as of  
18 December 1st?

19 A Yes, it does.

20 Q And does Exhibit (garbled) of the three Funds --

21 THE COURT: Okay. Mr. --

22 BY MR. WRIGHT:

23 Q -- and the various CLOs, --

24 THE COURT: Mr. Wright?

25 BY MR. WRIGHT:

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1 Q -- as you understand it?

2 THE COURT: Mr. Wright, time out. Two things.

3 First, I don't know what you can do to improve --

4 MR. WRIGHT: Sure.

5 THE COURT: -- your connection, but you're

6 occasionally breaking up a little.

7 But second, can we be clear for myself, the record,  
8 everyone else, what you're referring to right now? We have an  
9 Advis... your witness and exhibit list is at Docket 1573. Is  
10 that what I should be looking at first?

11 MR. WRIGHT: Yes, Your Honor. The declaration of Mr.  
12 Norris. It's Docket 1522-1. And it's on our exhibit list.  
13 It may be the only exhibit on our exhibit list, frankly.

14 THE COURT: Okay. So you're talking about his  
15 declaration now, not the witness and exhibit list with the  
16 attachments to it? Actually, it is attached here. Exhibit A.  
17 Okay. I'm there. I went to Exhibit A in your attachments to  
18 your exhibit list at 1573.

19 All right. Let's try again with your question you just  
20 asked.

21 MR. WRIGHT: Sure.

22 BY MR. WRIGHT:

23 Q So, Mr. Norris, Exhibit A, this reflects the current  
24 repayment status of the CLOs that are the subject of the  
25 motion as of December 1. Correct?



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1 A Correct.

2 Q And then --

3 MR. WRIGHT: Your Honor, if you turn to Exhibit B,  
4 which is just a couple pages forward.

5 MR. MORRIS: Your Honor, I would ask that this be put  
6 up on the screen, if possible.

7 THE COURT: Yes. Can you do that, please?

8 MR. WRIGHT: I'm sorry. I couldn't hear that, John.

9 THE COURT: He asked if you could --

10 MR. MORRIS: I would --

11 THE COURT: -- share your screen. Can you share your  
12 screen as to what you're looking at?

13 MR. WRIGHT: Can I share my screen? Last time I was  
14 using a computer and you were having trouble hearing me, so  
15 this time I'm doing it on my phone. So my phone, no, I don't  
16 have this on my phone to share my screen that way. It's  
17 Docket 1522-1, and it's the only exhibit that was on our  
18 exhibit list.

19 MR. MORRIS: No objection, Your Honor.

20 MR. WRIGHT: All it shows is the holdings in Funds in  
21 the CLOs. That's all it is.

22 MR. MORRIS: No objection, Your Honor.

23 THE COURT: Okay.

24 MR. NORRIS: I'm sorry, John. I didn't hear.

25 THE COURT: Give me a minute, because I was at 1573,

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1 your witness and exhibit list.

2 (Pause.)

3 THE COURT: Okay. That's not the correct docket  
4 number.

5 MR. MORRIS: Your Honor?

6 THE COURT: Yes?

7 MR. MORRIS: If I may, it's John -- it's John Morris.  
8 It's Docket No. 1528. And the declaration can be found at  
9 Page 12 of 26.

10 MR. WRIGHT: Thank you.

11 THE COURT: 1528?

12 MR. WRIGHT: That's bizarre, because I have a  
13 printout of it and it says Docket 1522-1.

14 THE COURT: Okay. 1528 is the -- the actual motion  
15 we've set for hearing.

16 MR. MORRIS: And it's attached to that, yes. If you  
17 -- if you go to PDF Page 12, it's the first page of the  
18 declaration.

19 THE COURT: Okay. I'm there now. Okay. So we're on  
20 that declaration. And then you were having the witness look  
21 first at Exhibit A to that declaration. And then where are  
22 you having him look next? Exhibit B, which is entitled  
23 "Holdings of Preferred Shares in CLOs"?

24 MR. WRIGHT: Exhibit B, Your Honor.

25 THE COURT: Okay. Continue.

Norris - Direct

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1 MR. WRIGHT: (garbled) I think some of the exhibits  
2 that I have had the wrong docket number printed on the top,  
3 and I --

4 BY MR. WRIGHT:

5 Q Exhibit B. So, Mr. Norris, Exhibit B to your declaration  
6 shows the holdings of the preference shares of the Funds in  
7 the various CLOs that are the subject of the motion, correct?

8 A That's correct. One clarification. It shows the  
9 percentage ownership of each of those preference share  
10 tranches that each Fund owns.

11 Q Thank you. Mr. Norris, do the three Funds have a date by  
12 which they have to liquidate their investments?

13 A Sorry, you did skip out there. If you could you repeat  
14 the question. I apologize.

15 Q It's frustrating. Do the three Funds have a date by which  
16 they must liquidate their investments?

17 A No. They do not.

18 Q Okay. Can you briefly explain why the Advisors and the  
19 Funds brought this motion?

20 A Yeah. The Advisors and the Funds were concerned with  
21 certain transactions, as described in the motion. As  
22 preference share owners, we own the majority or a substantial  
23 portion of the economics of most of these CLOs, and in three  
24 instances the majority of the economic benefit. And there was  
25 concern with the way that the sales were executed. And so,

Norris - Cross

35

1 with that, we're simply asking for a temporary relief in order  
2 to benefit and to maximize the recovery for our preference  
3 shares that we own.

4 Q Thank you.

5 MR. WRIGHT: All right, Your Honor. I have no  
6 further questions for Mr. Norris, although I guess I reserve  
7 the right to redirect.

8 THE COURT: All right. Cross-examination?

9 MR. MORRIS: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. MORRIS:

12 Q Good afternoon, Mr. Norris. Can you hear me?

13 A I can. Thank you, Mr. Morris.

14 Q All right. I'm going to go into a little bit more detail  
15 about some of the topics that you discussed. To be clear  
16 here, there are five moving parties; is that right?

17 A That's correct. The two Advisors and the three Funds.

18 Q And one of the advisory firms is Highland Capital  
19 Management Fund Advisors, LP; is that right?

20 A That's correct.

21 Q And I'll refer to that as Fund Advisors; is that okay?

22 A That's great.

23 Q James Dondero and Mark Okada are the beneficial owners of  
24 Fund Advisors, correct?

25 A That is my understanding, yes.

Norris - Cross

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1 Q And your understanding is that Mr. Dondero controls Fund  
2 Advisors, correct?

3 A That's correct.

4 Q And the other advisory firm that brought the motion is  
5 NexPoint Advisors, LP; is that right?

6 A That is correct.

7 Q And Mr. Dondero is the beneficial owner of NexPoint; is  
8 that right?

9 A A family trust where Jim is the sole beneficiary, I  
10 believe, controls or owns NexPoint Advisors.

11 Q Okay. And Mr. Dondero --

12 A Or 99.9 percent of NexPoint Advisors.

13 Q Thank you for the clarification. Mr. Dondero controls  
14 NexPoint; is that right?

15 A Correct.

16 Q All right. And I'm going to refer to Fund Advisors and  
17 NexPoint as the Advisors going forward; is that fair?

18 A That's fair.

19 Q Each of the Advisors manages certain funds; is that right?

20 A That is correct.

21 Q And three of those funds that are managed by the Advisors  
22 are the Movants on this motion, correct?

23 A Correct.

24 Q All right. The Advisors caused these three Funds to  
25 invest in CLOs that are managed by the Debtor; is that right?

Norris - Cross

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1 A The portfolio managers working for the Advisors did.

2 That's correct.

3 Q And Mr. Dondero is the portfolio manager of the Highland

4 Income Fund; is that right?

5 A He is one of the portfolio managers for that Fund.

6 Q And he's also --

7 A I believe there are two.

8 Q And he's also a portfolio manager of NexPoint Capital,

9 Inc., one of the Movants here, right?

10 A That is correct.

11 Q And he's also the portfolio manager of NexPoint Strategic

12 Opportunities Fund, another Movant; is that right?

13 A Yes. That is correct.

14 Q Okay. And I think you testified earlier that each of

15 these Funds has a board. Is that right?

16 A That is correct.

17 Q But the boards don't make investment decisions for the

18 Funds, do they?

19 A They do not. They have delegated that authority.

20 Q And that authority to make investment decisions is

21 delegated to the Advisors; is that right?

22 A Yes.

23 Q Okay. And none of the boards of the Funds who are Movants

24 here adopted any resolution authorizing the Funds to file this

25 motion; is that right?

Norris - Cross

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1 A To my knowledge, that is correct.

2 Q And in fact, the boards were not required to approve the  
3 filing of this motion, correct?

4 A I'm not -- I believe that's a legal question, but to my  
5 knowledge, there was not a requirement of the board to -- or,  
6 to adopt a resolution for that.

7 Q Okay. Let's talk a little bit about your background. I  
8 think you testified that you're the executive vice president  
9 at NexPoint Advisors, one of the Movants. Is that right?

10 A That's right.

11 Q Who's the president of NexPoint Advisors, LP?

12 A Mr. Dondero.

13 Q And you report directly to him; is that right?

14 A I do.

15 Q You're also the executive vice president of Fund Advisors,  
16 another Movant; is that right?

17 A Correct.

18 Q And Mr. Dondero is the president of Fund Advisors; is that  
19 right?

20 A He is not. There is no president of Fund Advisors. But  
21 he -- yeah.

22 Q You're the president of another entity called NexPoint  
23 Securities; is that right?

24 A That's correct.

25 Q And you're also the executive vice president of the 11 or

Norris - Cross

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1 12 funds that are managed by the Advisors here, right?

2 A Yes. That is correct.

3 Q Okay. You've been working for Highland Capital Management  
4 or other Highland-related entities for a little more than a  
5 decade; is that right?

6 A That's correct. Since June 2010.

7 Q Okay. Now, you don't personally make any investment  
8 decisions for -- for the Funds. Is that right?

9 A That's correct.

10 Q And you don't hold yourself out as an investment manager,  
11 do you?

12 A I do not.

13 Q And you've never worked for a CLO, have you?

14 A Never worked for a -- for a C -- employed by a CLO.  
15 Worked on accounting, various other aspects, but never worked  
16 for a CLO.

17 Q Okay. You referred earlier to the declaration that you've  
18 submitted in support of the motion. Do you remember that?

19 A I do.

20 Q I've got an assistant on the line here.

21 MR. MORRIS: Ms. Cantey, can we put up onto the  
22 screen Debtor's Exhibit C, which I believe was Mr. Norris's  
23 declaration? And if we could go to Page 12 of 26. Oh, all  
24 right.

25 BY MR. MORRIS:



Norris - Cross

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1 Q And, again, Mr. Norris, as we did in the deposition  
2 yesterday, I'll remind you of the difficulty of doing a  
3 virtual examination. And if at any time I ask you a question  
4 about your declaration that prompts you to think you need to  
5 see another portion of the declaration, will you let me know  
6 that?

7 A Yes, I will.

8 Q Okay. Because I'm not here to test your memory. I'm just  
9 here to ask you certain questions. So please let me know if  
10 you need to see something that's not on the screen itself.

11 You didn't write any portion of this declaration; is that  
12 right?

13 A I did not.

14 Q And you didn't provide any substantive comments to the  
15 declaration as drafted because you agreed with -- with the  
16 declaration as written by others; is that fair?

17 A Correct.

18 Q And all of the key information in your declaration was  
19 supplied by NexPoint's management; isn't that right?

20 A Correct.

21 Q The individuals who provided the information that's in  
22 your declaration include D.C. Sauter, Jason Post, Mr. Dondero,  
23 and outside counsel at K&L Gates; is that right?

24 A Correct.

25 Q And Mr. Sauter is in-house counsel at the Advisors; is

Norris - Cross

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1 that right?

2 A That is right.

3 Q And Mr. Post is the chief compliance officer at NexPoint;  
4 is that right?

5 A That's correct.

6 Q The whole idea for this motion initiated with Mr. Dondero;  
7 isn't that right?

8 A The concern, yes, the concern originated, and his concern  
9 was voiced to our legal and compliance team.

10 Q Okay.

11 MR. MORRIS: Can we take the declaration down for --  
12 oh, actually, no, I'm sorry, leave it there, and let's talk  
13 about Exhibit B. Now we can all see it. If you can scroll  
14 down to Exhibit B, please. Okay.

15 BY MR. MORRIS:

16 Q This page is attached to your declaration, right?

17 A That's correct.

18 Q And this page is intended to show the percentage of  
19 preferred shares owned by each of the Movant Funds and the 15  
20 different CLOs, right?

21 A That's right.

22 Q And the Debtor is the portfolio manager for each of these  
23 CLOs; is that right?

24 A Yes.

25 Q And it's your understanding that the Debtor's management

Norris - Cross

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1 of the CLOs on this page is governed by written agreements  
2 between the Debtor and each of the CLOs, right?

3 A Yes.

4 Q None of the Movants are parties to the agreements between  
5 the Debtor and each of the CLOs pursuant to which the Debtor  
6 serves as portfolio manager; is that correct?

7 A I believe that is correct. One, I think, important --  
8 even though they're not subject to the agreement, they are the  
9 -- they have the economic ownership of each of these CLOs.

10 Q But they're not party to the agreement; is that right?

11 A Not that I'm aware of.

12 Q Okay. And in preparing for this motion and preparing for  
13 your testimony, you didn't personally review any of the  
14 agreements between the Debtor and any of the CLOs listed on  
15 this page, right?

16 A No. I relied on legal counsel for that review.

17 Q Okay. And, but even though you didn't review the  
18 agreements, it's your understanding that among the  
19 responsibilities that the Debtor has as the portfolio manager  
20 is buying and selling assets on behalf of the CLOs; is that  
21 right?

22 A Yes. And I believe I specifically stated in my statement,  
23 if you want to turn to it, what I (audio gap) to regarding the  
24 CLOs' duties under the agreements.

25 Q Okay. It's your understanding, in fact, that nobody other

Norris - Cross

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1 than the Debtor has the right or the authority to buy and sell  
2 assets on behalf of the CLOs listed on Exhibit B, correct?

3 A That's my understanding.

4 Q Okay. And it's also your understanding, your specific  
5 understanding, that holders of preferred shares do not make  
6 investment decisions on behalf of the CLO; is that right?

7 A Correct.

8 Q And that's something that the Advisors knew when they  
9 decided to invest in the CLOs on behalf of the Movant Funds;  
10 is that fair?

11 A That's right. And at that time, the knowledge in the  
12 purchase was with Highland Capital Management, LP and the  
13 portfolio management team at that time.

14 Q And it's still with Highland Capital Management, LP; isn't  
15 that right?

16 A That's correct. I'm not sure that the portfolio  
17 management team looks the same, but it was HCMLP.

18 Q Okay. Let's just look at this document for a second. The  
19 first column has the list of the CLOs in which the Movant  
20 Funds have invested; is that right?

21 A Correct.

22 Q And the second column, HIF, that stands for Highland  
23 Income Fund; is that right?

24 A Yes, sir.

25 Q And Highland Income Fund is one of the Funds who are the

Norris - Cross

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1 Movants here, right?

2 A That is correct.

3 Q And the percentages below that show the percentage of the  
4 preference shares of each of the CLOs that that particular  
5 fund holds; is that right?

6 A That's right.

7 Q And then the third column relates to NexPoint Strategic  
8 Opportunities Fund, one of the Movants here; is that right?

9 A That's correct.

10 Q And the next column, the fourth column, relates to  
11 NexPoint Capital, Inc.'s holding of preference shares in the  
12 15 CLOs, right?

13 A That's right.

14 Q So, NexPoint Capital doesn't hold any preference shares in  
15 any of the CLOs except for a less-than-one-percent interest in  
16 Grayson; am I reading that correctly?

17 A Yes, that's correct.

18 Q Okay. And then the last column is intended to show the  
19 aggregate portion or percentage of preference shares that the  
20 three moving Funds have in each of the 15 CLOs; is that right?

21 A Yes, that's right.

22 Q Okay. Am I reading this correctly that, for 12 of the 15  
23 Funds, the moving Funds own less than a majority of the  
24 outstanding preferred shares?

25 A Yes, that's correct.

Norris - Cross

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1 Q And is it also -- am I also reading this correctly to  
2 conclude that the moving Funds owned less than 70 percent of  
3 every one of these CLOs; is that right?

4 A That's correct.

5 Q You don't know who owns the preferred shares in the CLOs  
6 that are not owned by the Movant Funds, do you?

7 A I don't know any -- any specific owners.

8 Q And some of these CLOs still have notes that are  
9 outstanding; is that right?

10 A Yes. Very small amounts as a percentage of the overall  
11 CLO original capital structure, but yes, some still have small  
12 --

13 Q So, --

14 A -- notes. Small amounts of notes.

15 Q Okay. I'm sorry to interrupt. If we looked at Exhibit A,  
16 if we took the time to look at Exhibit A, Exhibit A would  
17 show, for each of the 15 CLOs, which of those CLOs still had  
18 notes outstanding and the amount of out -- the dollar value of  
19 those notes. Is that right?

20 A That's correct.

21 Q Okay. And your understanding is that -- your  
22 understanding -- withdrawn. The payment -- the distributions  
23 from the CLOs are made pursuant to a waterfall; is that right?

24 A Yes, that's correct.

25 Q And your understanding of the waterfall process is that

Norris - Cross

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1 the notes that are still outstanding at any CLO must be paid  
2 -- must be paid in full before the preferred shares receive  
3 any recovery; is that right?

4 A So, I would say that my understanding is slightly  
5 different. It's going to be dependent on each indenture.  
6 But, in general, interest payments are made to the debt  
7 holders, and anything extra is then allocated to the equity.  
8 But ultimate recovery, to your point, would be once those --  
9 once the debt is paid off. And that's the critical thing  
10 here, where the preference shares here now with most of these  
11 CLOs almost all the way wound down, with the exception of a  
12 small piece of debt. The equity owns the lion's share of the  
13 economic interest of every one of these CLOs. And I think  
14 that's important.

15 Q Okay. Some of the CLOs still have outstanding notes. Is  
16 that right?

17 A Yes. As we discussed on -- Exhibit A will have the notes  
18 that are -- that are remaining on those.

19 Q And you don't know who holds the notes in the other CLOs,  
20 right?

21 A I don't.

22 Q The only holders of preferred shares that are pursuing  
23 this motion are the three Funds managed by the Advisors,  
24 right?

25 A In this motion, yes.

Norris - Cross

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1 Q You're not aware of any holder of preferred shares  
2 pursuing this motion other than the three Funds managed by the  
3 Advisors, correct?

4 A No, I'm not aware of any others.

5 Q You didn't personally inform any holder of preferred  
6 shares, other than the Funds that are the Movants, that this  
7 motion would be filed, did you?

8 A No, I did not.

9 Q You're not aware of any steps taken by either of the  
10 Advisors to provide notice to holders of preferred shares that  
11 this motion was going to be filed, are you?

12 A I'm not, no.

13 Q And you're not aware of any attempt that was made to  
14 obtain the consent of all of the holders of the preferred  
15 shares to seek the relief sought in this motion, correct?

16 A That's correct.

17 Q You don't have any personal knowledge, personal knowledge,  
18 as to whether any holder of preferred shares other than the  
19 Funds managed by the Advisors wants the relief sought in the  
20 motion, correct?

21 A Correct.

22 Q You don't have any personal knowledge as to whether any of  
23 the CLOs that are subject to the contracts that you described  
24 want the relief that's being requested in this motion, right?

25 A That's correct. I have not spoken or been involved at all



Norris - Cross

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1 directly with the CLOs. I'm representing the Funds.

2 Q Okay. Now, two of the Funds, two of the three Movant  
3 Funds, I believe you testified are publicly traded; is that  
4 right?

5 A That's correct.

6 Q And that's the Highland Income Fund and the NexPoint  
7 Strategic Opportunities Fund; is that right?

8 A That's right. That's right.

9 Q And because they are publicly-traded, the shareholders in  
10 those two funds can sell their shares any time the market is  
11 open; is that right?

12 A If they're willing to take the price that the market is  
13 willing to give, yes.

14 Q Yes.

15 A Between market hours.

16 Q And if they -- if they don't like the way the assets that  
17 are -- that the Funds have been invested, one of the things  
18 they could do is simply sell their shares, right?

19 A Yes.

20 Q And the third fund, the shareholders in the third fund  
21 have the right to sell out not on a public market but on a  
22 quarterly basis; is that right?

23 A Correct.

24 Q That third Movant Fund is NexPoint Capital; do I have that  
25 right?

Norris - Cross

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1 A Correct.

2 Q So they also have the ability to exit if they don't like  
3 management on a quarterly basis; is that right?

4 A Correct.

5 Q All right. Can we turn to Paragraph -- Paragraphs 8 and 9  
6 of your declaration? Okay. Paragraph 8 describes a  
7 transaction that's been referred to as OmniMax; is that right?

8 A Yes.

9 Q And Paragraph 9 refers to a transaction involving SSP  
10 Holdings, LLC; do I have that right?

11 A That's correct.

12 Q Do you know what SSP stands for?

13 A See if we say it in there. SSP Holdings, LLC.

14 Q Right. Do you know what SSP stands for?

15 A I don't. Something Steel Products. I --

16 Q Okay. You don't need to guess. These are the only two  
17 transactions that the Movants question; is that right?

18 A These transactions, as well as certain transactions around  
19 Thanksgiving time.

20 Q Okay. We'll talk about those. But those transactions  
21 about -- around Thanksgiving time aren't in your declaration,  
22 are they?

23 A Not specifically mentioned by name.

24 Q Okay. Let's talk about the two that are mentioned by  
25 name, Trussway and SSP. The Movants do not contend that

Norris - Cross

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1 either transaction was the product of fraudulent conduct, do  
2 they?

3 A No.

4 Q The Movants do not contend that the Debtor breached any  
5 agreement by effectuating these transactions, do they?

6 A I don't believe so.

7 Q In fact, the Movants do not contend that the Debtor  
8 violated any agreement at any time in the management of the  
9 CLOs listed on Exhibit B; is that right?

10 A That's right.

11 Q The Movants don't even question the Debtor's business  
12 judgment, only the results of the trans -- of these two  
13 transactions. Is that right?

14 A That's right. And results is the key here and the  
15 approach.

16 Q I see. And the reason the Movants do not question the  
17 Debtor's business judgment is because you don't know what  
18 factor or factors the Debtor considered in executing these  
19 transactions, right?

20 A That's right. I can't look into the mind or know the  
21 business judgment and the inputs that went into this. We do  
22 know the outcomes. And to us, that's troubling, right, as the  
23 owners of the lion's share or the majority or even significant  
24 amounts of the economic ownership of the CLOs. And having  
25 insight into those transactions, as mentioned in my statement,

Norris - Cross

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1 really just trying to maximize recoveries for our Funds.

2 MR. MORRIS: Your Honor, I move to strike the portion  
3 of his answer following that which was responsive to the  
4 question.

5 THE COURT: All right. I grant that motion.

6 MR. MORRIS: Okay.

7 BY MR. MORRIS:

8 Q Sir, you never asked the Debtor what factors it considered  
9 in making these trades, right?

10 A I did not.

11 Q And you have no reason to believe that anyone on behalf of  
12 the Movants ever asked the Debtor why it executed these  
13 trades, right?

14 A I don't have any knowledge. There could have been  
15 somebody from -- from the Movants. But I did not.

16 Q Okay. On OmniMax, the Movants disagree with the price at  
17 which the Debtor effectuated the trade, right?

18 A Correct.

19 Q And I believe there was a meeting of the boards of the  
20 Funds back in August at which Mr. Seery appeared. Do I have  
21 that right?

22 A I believe it was August, but he did appear.

23 Q And the purpose of the appearance was so that Mr. Seery  
24 could give an update on the bankruptcy; is that right?

25 A That's correct, and on the services provided by Highland

Norris - Cross

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1 Capital Management, LP to our Advisor. Advisors. They  
2 provide various shared services.

3 Q And it was during that meeting that Mr. Seery forthrightly  
4 told the boards the price at which he was planning to execute  
5 the OmniMax transaction, correct?

6 A Correct.

7 Q The transaction hadn't yet occurred, right?

8 A I'm not sure if it had been finalized. He had a price,  
9 and these -- these things are negotiated. This was, I  
10 believe, a company in restructuring. So I don't know whether  
11 it had been transacted or not.

12 Q Okay. The board didn't ask Mr. Seery not to execute the  
13 transaction, did it?

14 A Not to my knowledge. The board wouldn't -- I don't think  
15 the board would have that authority, either.

16 Q Okay. But it's here asking the Court to cause the Debtor  
17 to pause in the execution of any trades in the CLOs; is that  
18 right?

19 A I think the order speaks in that regard.

20 Q Yeah. Okay. Let's talk about the SSP transaction for a  
21 moment. It's your understanding that Trussway Holdings, LLC  
22 owned a majority interest in SSP Holdings, LLC, right? That's  
23 in Paragraph 9.

24 A Yes. The statement in Paragraph 9 is what I believe is  
25 correct.

Norris - Cross

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1 Q Okay. And it's also your understanding that Trussway is a  
2 wholly-owned subsidi... I'm sorry, that SSP Holdings is a  
3 wholly-owned subsidiary -- withdrawn. It's also your  
4 understanding that Trussway is a wholly-owned subsidiary of  
5 the Debtor, right?

6 A Yes.

7 Q But Trussway is not a debtor in bankruptcy, right?

8 A I'm not sure.

9 Q Okay. You have no reason to believe that; is that fair?

10 A That it's not a debtor in bankruptcy? That Trussway is  
11 not in bankruptcy itself?

12 Q Correct.

13 A Yeah. I have no knowledge of Trussway's situation.

14 Q Okay. But you -- but according to your declaration that  
15 was prepared by the Advisors' management team, Trussway and  
16 not the Debtor owned SSP Holdings, LLC. Is that right?

17 A I'm looking here at the statement just to make sure.

18 Q Sure.

19 (Pause.)

20 A I -- again, I -- the statement is correct, and I believe  
21 speaks for itself regarding entity ownership.

22 Q The only things you know about the SSP transaction are,  
23 one, that you believe it was made without a formal bidding  
24 process; and two, that it resulted in a \$10 million loss. Is  
25 that right?

Norris - Cross

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1 A Correct.

2 Q Okay. But, again, neither you, or to the best of your  
3 knowledge, anybody at Advisors, ever spoke with anybody at the  
4 Debtor about the circumstances concerning either of the  
5 transactions, right?

6 A I don't know the conversations that were had at anyone  
7 else from our Advisors, but this is the knowledge that -- that  
8 I have.

9 Q Okay. And it's the only knowledge you have, right? You  
10 don't know anything about the SSP transaction other than those  
11 two facts, right?

12 A Correct.

13 Q In fact, I think you testified yesterday that you've been  
14 very remote from the SSP transaction, right?

15 A That's correct.

16 Q And that it's not a transaction that you have much  
17 knowledge on. Fair?

18 A Fair.

19 Q Let's just talk briefly about the transactions that  
20 occurred (garbled) Thanksgiving. They're not specifically  
21 referred to in your declaration; is that right?

22 A That's correct.

23 Q And you have no knowledge about any transaction that Mr.  
24 Seery wanted to execute around Thanksgiving; is that right?

25 A I know there were transactions and there were concerns

Norris - Cross

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1 from our management team, but I'm not aware of what the  
2 transactions were.

3 Q In fact, you can't even identify the assets that Mr. Seery  
4 wanted to sell around Thanksgiving, or at least you couldn't  
5 at the time of your deposition yesterday. Is that right?

6 A That's correct.

7 Q And you have no knowledge as to why Mr. Seery wanted to  
8 make those particular trades at around Thanksgiving?

9 A No, I don't.

10 Q And in fact, you don't even know if the transactions that  
11 Mr. Seery wanted to close around Thanksgiving ever in fact  
12 closed. Is that fair?

13 A Correct.

14 Q Okay. Let's just -- let's just finish up with a few  
15 questions about the boards.

16 MR. MORRIS: Ms. Cantey, can we put up Debtor's  
17 Exhibit EEEE? Four E's, Your Honor. Thank you.

18 BY MR. MORRIS:

19 Q This particular page identifies the directors for each of  
20 the three Movant Funds; is that right?

21 A Let me take a look and confirm. (Pause.) Yes. That  
22 looks correct.

23 Q Okay. And this was prepared by the Movants; is that  
24 right?

25 A I'm not sure who prepared it.



Norris - Cross

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1 Q Okay. To the best of your knowledge, does this document  
2 accurately reflect the composition of the boards of each of  
3 the three Movant Funds?

4 A Yes, it does.

5 Q Okay. John Honis, I think you mentioned him earlier.  
6 He's on all three boards. Is that right?

7 A That's correct. And the reason being we have a unitary  
8 board structure, so -- which is very common in '40 Act Fund  
9 land, where the board sits, for efficiency purposes, on  
10 multiple fund boards, and there's a lot of economies of scale  
11 from an operating standpoint. So, yes, they sit on multiple  
12 boards.

13 Q Okay. And for purposes of the '40 Act, Mr. Honis has been  
14 deemed to be an interested trustee. Is that right?

15 A That's correct.

16 Q Okay. But you don't specifically know what facts caused  
17 that designation; you only know that the designation exists.  
18 Right?

19 A That's right. And I know they are disclosed in the proxy  
20 -- or, in the -- the relative filings related to those Funds.

21 Q Okay. Three other people are common to all three of the  
22 Movant Funds. I think you've got Dr. Froehlich, Ethan Powell,  
23 --

24 A Froehlich.

25 Q Froehlich. Ethan Powell and Bryan Ward. Right?

Norris - Cross

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1 A That is correct.

2 Q Okay. All three of those individuals actually serve on  
3 the 11 or 12 boards that you mentioned earlier that are  
4 managed by the Advisors, right?

5 A Yes, that is correct.

6 Q And they're the same Funds for which you serve as an  
7 executive vice president, right?

8 A Yes. That's correct.

9 Q So, for all of the Funds that are managed by the Advisors,  
10 you serve as executive vice president and all four of these  
11 directors -- trustees serve as trustees on the boards, right?

12 A Yes, that's correct.

13 Q Okay. In exchange for serving on all of these boards, the  
14 three individuals -- Dr. Froehlich, Mr. Ward, and Mr. Powell  
15 -- each receive \$150,000 a year for services across the  
16 Highland complex; is that right?

17 A That's correct.

18 Q Dr. Froehlich has been serving as a board member across  
19 the Highland complex for seven or eight years now; is that  
20 right?

21 A That's correct.

22 Q Mr. --

23 A I believe it's about seven or eight years.

24 Q And Mr. Powell, he actually was employed by Highland or  
25 related entities from about 2007 or 2008 until 2015, right?

Norris - Cross

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1 A That's correct.

2 Q And Mr. Ward, the third of the independent trustees, he's  
3 been serving as a board member on various Highland-related  
4 funds on a continuous basis since about 2004. Do I have that  
5 right?

6 A Yeah, I believe that's correct.

7 Q Okay. Just a couple of final questions. You would agree,  
8 would you not, sir, that portfolio managers have an obligation  
9 to effectuate transactions concerning the assets that they  
10 manage based on their business judgment?

11 A Yes. And in accordance with whatever governing documents  
12 govern the fund structure.

13 Q And you would personally expect a portfolio manager to  
14 execute a transaction that he or she reasonably believes in  
15 good faith and in their business judgment would maximize value  
16 for the CLO, even if the CLO did not need cash at that  
17 particular time. Is that right?

18 A I think it would come down to the governing documents.  
19 And I think what you're getting at here is, in this instance,  
20 these sales and the intent of the portfolio manager. And our  
21 view, again, is -- and the request for the motion is simply  
22 there is a lot at play here. Several negotiations. And in  
23 order to maximize returns, simply asking for a pause on  
24 transactions.

25 Q All right. Let me -- let me ask the question again, and I

Norris - Cross

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1 would ask that you please listen carefully to the question.  
2 You would expect a portfolio manager would execute a  
3 transaction that he or she believes maximizes value, even if  
4 the CLO didn't need cash at that particular moment in time.  
5 Correct?

6 A Yeah. As long as that is maximizing value for the  
7 stakeholders, and in the instance of a CLO, the economic  
8 interest is owned by the equity holders. So, to their  
9 benefit, yes, that -- that would be the idea.

10 MR. MORRIS: Your Honor, I have no further questions.

11 THE COURT: Any redirect, Mr. Wright?

12 MR. WRIGHT: Only briefly, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. WRIGHT:

15 Q Mr. Norris, I think you were asked at one point about how  
16 long you'd been working for Highland Capital Management, which  
17 there's -- there's Highland Capital Management Fund Advisors  
18 and then there's Highland Capital Management, LP, Debtor. And  
19 I wanted to give you an opportunity to just explain when and  
20 what years you worked for HCMLP and then when and what years  
21 you worked for NexPoint Advisors or Highland Capital  
22 Management Fund Advisors.

23 A Yes. From June 2010, I was employed by Highland Capital  
24 Management, LP, until July or August of 2012, at which time I  
25 was then hired by Highland Capital Management Fund Advisors,

Norris - Redirect

60

1 not HCML -- no longer employed by HCMLP, and have worked since  
2 that time for HCMFA and NexPoint Advisors and not for the  
3 Debtor, HCMLP.

4 Q Okay. So -- and I'm sorry if I missed a year, but it's  
5 been about ten years since you had worked for HCMLP or been an  
6 employee of HCMLP, correct?

7 A Yeah. It's been over eight years since I have left  
8 employment by HCMLP. Ten and a half years ago, I started  
9 working for HCMLP, and then two years after that transitioned  
10 away and started working for the Advisors that are part of  
11 this motion.

12 Q Thank you for clarifying.

13 MR. WRIGHT: Your Honor, I hope -- you directed us to  
14 have a witness here today, and so we do. And I know that you  
15 had asked me at the last hearing some questions about the  
16 involvement of people at HCMLP, which I tried to address with  
17 Mr. Norris in my direct. But I, you know, I do want to make  
18 sure that we've answered any questions that you have.

19 THE COURT: All right. Yes, that's fine. Are you  
20 -- does that conclude your redirect?

21 MR. WRIGHT: It does, Your Honor.

22 THE COURT: Any recross, Mr. Morris, on that  
23 redirect?

24 MR. MORRIS: No, thank you, Your Honor.

25 THE COURT: All right, then. That concludes the

1 testimony of Mr. Norris.

2 Any other evidence, Mr. Wright?

3 MR. WRIGHT: I do not, Your Honor, although I guess I  
4 would offer the Exhibit A and Exhibit B to Mr. Norris's  
5 declaration --

6 THE COURT: Any objection to that?

7 MR. WRIGHT: -- into evidence.

8 MR. MORRIS: No, Your Honor.

9 THE COURT: All right. Those are admitted.

10 (Movants' Exhibits A and B are received into evidence.)

11 THE COURT: All right. Well, Mr. Morris, did you  
12 want to put on any evidence?

13 MR. MORRIS: Does the -- do the Movants rest, Your  
14 Honor?

15 THE COURT: I understood that they rest. Correct,  
16 Mr. Wright?

17 MR. WRIGHT: That's correct, Your Honor.

18 MR. MORRIS: Your Honor, I would move, effectively,  
19 for a directed verdict here. The Movants have the burden of  
20 establishing a *prima facie* case to entitlement to the relief  
21 that's been requested, and they have failed to meet that  
22 burden. The Debtor has -- we -- the undisputed facts are the  
23 Debtor has the contractual right, and indeed, the obligation,  
24 to serve as the portfolio manager of the CLOs pursuant to  
25 written agreements.

1       The Movants are not parties to those agreements. The  
2 testimony is undisputed that there are many holders of  
3 preferred shares and notes that have had no notice of this  
4 proceeding that will undoubtedly be impacted by the tying of  
5 the hands of the portfolio manager. The chart that was  
6 attached as Exhibit B expressly shows just what a large  
7 portion of interested parties and people who would be affected  
8 by this motion are not -- they didn't get notice. There was  
9 no attempt to get notice. There was no attempt to get their  
10 consent. All of that testimony is now in the record, and I  
11 think due process alone would prevent the entry or even the  
12 consideration of an order of this type.

13       There is nothing improper that's been alleged. There is  
14 no -- there is no allegation of fraud. There is no allegation  
15 of breach of contract of any kind. There's not even a  
16 question of business judgment. The Movants didn't even do  
17 their diligence to ask the Debtor why they made these  
18 transactions. There is nothing in the record that shows that  
19 the Debtor, as the portfolio manager of the CLOs, did anything  
20 improper.

21       The only thing that the Movants care about is that they  
22 don't like the results in two particular trades. I don't  
23 think that that meets their burden of persuasion that the  
24 Court should enter an order of this type, and I would like to  
25 relieve Mr. Seery of the burden, frankly, and the Court, of

1 having to put on testimony to justify transactions that really  
2 aren't even being questioned, Your Honor.

3 So the Debtor would respectfully move for the denial of  
4 the motion and the relief sought therein.

5 THE COURT: All right. Your request for a directed  
6 verdict, something equivalent to a directed verdict here, is  
7 granted. I agree that the Movant has wholly failed to meet  
8 its burden of proof here today to show the Court, persuade the  
9 Court that, as Mr. Morris said, I should essentially tie the  
10 hands of the Debtor as a portfolio manager here, as stated.  
11 Nothing improper has been alleged. There has been no showing  
12 of a statutory right here, or a contractual right here, on the  
13 part of the Movants.

14 I am -- I'm utterly dumbfounded, really. I agree with the  
15 -- I was going to say innuendo; not really innuendo -- I agree  
16 with part of the theme, I think, asserted by the Debtor here  
17 today that this is Mr. Dondero, through different entities,  
18 through a different motion. I feel like he sidestepped the  
19 requirement that I stated last week that if we had a contested  
20 hearing on his motion, Dondero's motion, that I was going to  
21 require Mr. Dondero to testify. He apparently worked out an  
22 eleventh hour agreement with the Debtor on his motion to avoid  
23 that. But, again, these so-called CLO Motions very clearly,  
24 very clearly, in this Court's view, were pursued at his sole  
25 direction here.



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1           This is almost Rule 11 frivolous to me. You know, we're  
2 -- we didn't have a Rule 11 motion filed, and, you know, I  
3 guess, frankly, I'm glad that a week before the holidays begin  
4 we don't have that, but that's how bad I think it was, Mr.  
5 Wright and Mr. Norris. This is a very, very frivolous motion.  
6 Again, no statutory basis for it. No contractual basis. You  
7 know, you didn't even walk me through the provisions of the  
8 contracts. I guess that would have been fruitless. But you  
9 haven't even shown something equitable, some lack of  
10 reasonable business judgment.

11           Bluntly, don't waste my time with this kind of thing  
12 again. You wasted my time. We have 70 people on the video.  
13 Utter waste of time.

14           All right. So, motion is denied. Mr. Morris, please  
15 upload an order.

16           MR. MORRIS: Thank you, Your Honor.

17           THE COURT: All right. Do we have any other business  
18 to accomplish today?

19           MR. POMERANTZ: I don't think so, Your Honor. I know  
20 we will see you tomorrow in connection with Mr. Daugherty's  
21 relief from stay motion.

22           THE COURT: Well, yeah, we do have that. Okay. We  
23 will see you tomorrow. We stand adjourned.

24           MR. CLEMENTE: Thank you, Your Honor.

25           MR. MORRIS: Thank you, Your Honor.

65

THE CLERK: All rise.

(Proceedings concluded at 3:05 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

**/s/ Kathy Rehling**

**12/17/2020**

Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

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## EXHIBIT 27



December 22, 2020

A. Lee Hogewood, III  
Lee.hogewood@klgates.com

T: 1-919-743-7306

Jeffrey N. Pomerantz  
Ira D. Kharasch  
John A. Morris  
Gregory V. Demo  
Hayley R. Winograd  
Pachulski Stang Ziehl & Jones, LLP  
10100 Santa Monica Blvd., 13th Floor  
Los Angeles, CA 90067

Dear Counsel:

I am writing to you on behalf of our clients Highland Capital Management Fund Advisors, L.P. ("HCMFA") and NexPoint Advisors, L.P. ("NexPoint", and together with HCMFA, the "Advisors"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "Funds"). CLO Holdco, Ltd. ("CLO Holdco") whose counsel is copied below, joins in this notice and request.

As you are aware, certain registered investment companies and a business development company managed by either NexPoint or HCMFA own preference shares in many of the CLOs. In the following cases those companies own a majority of such shares<sup>1</sup>:

- Stratford CLO, Ltd. 69.05%
- Grayson CLO, Ltd. 60.47%
- Greenbriar CLO, Ltd. 53.44%

---

<sup>1</sup> These ownership percentages are derived from information provided by the Debtor. If the Debtor contends that the ownership percentages are inaccurate, please inform us of the Debtor's differing calculations.

December 22, 2020  
Page 2

In other cases, such companies in combination with CLO Holdco hold all, a super-majority, or a majority of the preference shares in the following CLOs:

- Liberty CLO, Ltd. 70.43%
- Stratford CLO, Ltd. 69.05%\*<sup>2</sup>
- Aberdeen Loan Funding, Ltd. 64.58%
- Grayson CLO, Ltd. 61.65%\*
- Westchester CLO, Ltd. 58.13%
- Rockwall CDO, Ltd. 55.75%
- Brentwood CLO, Ltd. 55.74%
- Greenbriar CLO, Ltd. 53.44%\*

Additionally, such companies own significant minority stakes in the following CLO's:

- Eastland CLO, Ltd. 41.69%
- Red River CLO, Ltd. 33.33%

The ownerships described above represent in many cases the total remaining outstanding interests in such CLOs, because the noteholders have been paid in full. In others, the remaining noteholders represent only a small percentage of remaining interests. Thus, the economic ownership of the registered investment companies, business development company, and CLO Holdco largely represent the investors in the CLOs identified above.

Contractually, the Debtor is obligated to maximize value for the benefit of the preference shareholders. Accordingly, we respectfully request that no further dispositions of CLO interests occur pending the confirmation hearing. While we recognize the Court denied the Advisor and Funds motion on this subject, the Court did not require liquidations occur immediately, and we reserve all rights to and remedies against the Debtor should the Debtor continue to liquidate CLO interests in contravention of this joint request. Given the Advisor, Funds, and CLO Holdco's requests, it is difficult to understand the Debtor's rationale for continued liquidations, or the benefit to the Debtor from pursuing those sales.

As you know, HCMLP's duties are set forth in the portfolio management agreements of the CLOs, which themselves have been adopted under the Investment Advisers Act of 1940 ("Advisers Act"). As HCMLP readily admits, it is: (i) terminating employees on January 31, 2021, which will result in a loss of the employees that have traditionally serviced those CLOs; (ii) ignoring the requests of the Advisors, Funds, and CLO Holdco, which together account for all or a majority of interests in certain CLOs, and selling assets of those CLOs prior to plan-confirmation; and (iii) adding a replacement manager as subadvisor prior to January 31, 2021. The Advisors, Funds, and CLO Holdco assert that those actions run in contravention to HCMLP's duty to maximize value for the holders of preference shares and thus what HCMLP has agreed to under the portfolio management agreement, as well as its duties under the Advisers Act, which ultimately will adversely impact the economic owners noted above.

---

<sup>2</sup> CLO's marked with an asterisk (\*) appear in the foregoing list as well.

December 22, 2020  
Page 3

For the forgoing and other reasons, we request that no further CLO transactions occur at least until the issues raised by and addressed in the Debtor's plan are resolved at the confirmation hearing.

Sincerely,

*A. Lee Hogewood, III*

A. Lee Hogewood, III

## EXHIBIT 28





December 23, 2020

A. Lee Hogewood, III  
Lee.hogewood@klgates.com

T: 1-919-743-7306

Jeffrey N. Pomerantz  
Ira D. Kharasch  
John A. Morris  
Gregory V. Demo  
Hayley R. Winograd  
Pachulski Stang Ziehl & Jones, LLP  
10100 Santa Monica Blvd., 13th Floor  
Los Angeles, CA 90067

Dear Counsel:

I am writing to you on behalf of our clients Highland Capital Management Fund Advisors, L.P. ("HCMFA") and NexPoint Advisors, L.P. ("NexPoint", and together with HCMFA, the "Advisors"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "Funds"). CLO Holdco, Ltd. ("CLO Holdco") whose counsel is copied below, joins in this notice and request.

As you are aware, certain registered investment companies and a business development company managed by either NexPoint or HCMFA own preference shares in many of the CLOs. In the following cases those companies own a majority of such shares<sup>1</sup>:

- Stratford CLO, Ltd. 69.05%
- Grayson CLO, Ltd. 60.47%
- Greenbriar CLO, Ltd. 53.44%

---

<sup>1</sup> These ownership percentages are derived from information provided by the Debtor. If the Debtor contends that the ownership percentages are inaccurate, please inform us of the Debtor's differing calculations.

December 23, 2020  
Page 2

In other cases, such companies in combination with CLO Holdco hold, a super-majority, or a majority of the preference shares in the following CLOs:

- Liberty CLO, Ltd. 70.43%
- Stratford CLO, Ltd. 69.05%\*<sup>2</sup>
- Aberdeen Loan Funding, Ltd. 64.58%
- Grayson CLO, Ltd. 61.65%\*
- Westchester CLO, Ltd. 58.13%
- Rockwall CDO, Ltd. 55.75%
- Brentwood CLO, Ltd. 55.74%
- Greenbriar CLO, Ltd. 53.44%\*

Additionally, such companies own significant minority stakes in the following CLO's:

- Eastland CLO, Ltd. 41.69%
- Red River CLO, Ltd. 33.33%

The ownerships described above represent in many cases the total remaining outstanding interests in such CLOs, because the noteholders have been paid in full. In others, the remaining noteholders represent only a small percentage of remaining interests. Thus, the economic ownership of the registered investment companies, business development company, and CLO Holdco largely represent the investors in the CLOs identified above.

In pleadings filed with the Bankruptcy Court, you asserted that one or more of the entities identified above lacked the authority to seek a replacement of the Debtor as fund manager because of the alleged affiliate status of the beneficial owners of such entities. We disagree.

Consequently, in addition to our request of yesterday, where appropriate and consistent with the underlying contractual provisions, one or more of the entities above intend to notify the relevant trustees and/or issuers that the process of removing the Debtor as fund manager should be initiated, subject to and with due deference for the applicable provisions of the United States Bankruptcy Code, including the automatic stay of Section 362. The basis for initiating the process for such removal includes, but is not limited to, the fact that HCMLP's duties, as set forth in the portfolio management agreements of the CLOs, are subject to the requirements of the Investment Advisers Act of 1940 ("Advisers Act"). HCMLP appears to be acting contrary to those duties under the agreements and where HCMLP is not fulfilling its duties under the portfolio management agreement it is therefore violating the Advisers Act. Thus, because HCMLP is (i) terminating employees on January 31, 2021, which will result in a loss of the employees that have traditionally serviced, including key investment professionals identified in the transactional documents for those CLOs (generally Mark Okada and Jim Dondero); (ii) ignoring the requests of the Advisors, Funds, and CLO Holdco, which together account for all or a majority of interests in certain CLOs, and selling assets of those CLOs prior to plan confirmation; (iii)

---

<sup>2</sup> CLO's marked with an asterisk (\*) appear in the foregoing list as well.

December 23, 2020  
Page 3

adding a replacement manager as subadviser prior to January 31, 2021; and (iv) for other cause, the Advisors, Funds, and CLO Holdco have concluded that they have no choice but to initiate HCMLP's removal as fund manager where such entities are contractually and legally permitted or obligated to do so.

Because the process of removal is being initiated, subject to the applicable provisions of the Bankruptcy Code, we respectfully request that no further CLO transactions occur at least until the issues raised by and addressed in the Debtor's plan are resolved at the confirmation hearing. To the extent there are CLO transactions prior to the confirmation, we intend to fully explore the business justification for doing so, as we do not believe there is any rational business reason to liquidate securities prior to that time.

Sincerely,

*A. Lee Hogewood, III*

A. Lee Hogewood, III

## EXHIBIT 29

	)	<b>Case No. 19-34054-sgj-11</b>
In Re:	)	Chapter 11
	)	
HIGHLAND CAPITAL	)	Dallas, Texas
MANAGEMENT, L.P.,	)	Tuesday, January 26, 2021
	)	9:30 a.m. Docket
Debtor.	)	
	)	MOTION FOR ENTRY OF ORDER
	)	AUTHORIZING DEBTOR TO
	)	IMPLEMENT KEY EMPLOYEE
	)	PLAN [1777]
	)	
<hr/>	)	
HIGHLAND CAPITAL	)	<b>Adversary Proceeding 21-3000-sjg</b>
MANAGEMENT, L.P.,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	PLAINTIFF'S MOTION FOR A
	)	PRELIMINARY INJUNCTION AGAINST
HIGHLAND CAPITAL	)	CERTAIN ENTITIES OWNED AND/OR
MANAGEMENT FUND ADVISORS,	)	CONTROLLED BY MR. JAMES
L.P., et al.	)	DONDERO [5]
	)	
Defendants.	)	

WEBEX APPEARANCES:

For the Debtor: John A. Morris  
PACHULSKI STANG ZIEHL & JONES, LLP  
780 Third Avenue, 34th Floor  
New York, NY 10017-2024  
(212) 561-7700

1 APPEARANCES, cont'd.:

2 For the Official Committee Matthew A. Clemente  
3 of Unsecured Creditors: SIDLEY AUSTIN, LLP  
4 One South Dearborn Street  
Chicago, IL 60603  
(312) 853-7539

5 For CLO Holdco, Ltd.: John J. Kane  
6 KANE RUSSELL COLEMAN LOGAN, P.C.  
7 901 Main Street, Suite 5200  
Dallas, TX 75202  
(214) 777-4261

8 For Certain Defendants: Davor Rukavina  
9 Julian Vasek  
MUNSCH, HARDT, KOPF & HARR  
10 500 N. Akard Street, Suite 3800  
Dallas, TX 75201-6659  
11 (214) 855-7587

12 For Certain Defendants: A. Lee Hogewood, III  
Emily Mather  
13 K&L GATES, LLP  
4350 Lassiter at North Hills  
14 Avenue, Suite 300  
Raleigh, NC 27609  
15 (919) 743-7306

16 For James D. Dondero: John T. Wilson  
BONDS ELLIS EPPICH SCHAFFER  
17 JONES, LLP  
420 Throckmorton Street,  
Suite 1000  
18 Fort Worth, TX 76102  
(817) 405-6900

19 For the U.S. Trustee: Lisa L. Lambert  
20 OFFICE OF THE UNITED STATES  
TRUSTEE  
21 1100 Commerce Street, Room 976  
Dallas, TX 75242  
22 (214) 767-8967

23 Recorded by: Michael F. Edmond, Sr.  
24 UNITED STATES BANKRUPTCY COURT  
1100 Commerce Street, 12th Floor  
25 Dallas, TX 75242  
(214) 753-2062

Transcribed by: Kathy Rehling  
311 Paradise Cove  
Shady Shores, TX 76208  
(972) 786-3063

Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

1 DALLAS, TEXAS - JANUARY 26, 2021 - 9:40 A.M.

2 THE COURT: All right. We have Highland settings  
3 this morning: a Motion for Approval of a KERP, which I didn't  
4 see objections to, and then a Preliminary Injunction hearing.  
5 Let me get appearances from the parties who have filed  
6 pleadings.

7 For the Debtor team, I see Mr. Morris. Who do we have  
8 appearing?

9 MR. POMERANTZ: Good morning, Your Honor. It's Jeff  
10 Pomerantz and John Morris appearing on behalf of the Debtor.  
11 I will handle the KERP motion, which we'll propose goes first  
12 and quickly, and then Mr. Morris will handle the adversary  
13 proceeding.

14 THE COURT: All right. Very good.

15 All right. Let me get appearances from the Defendants in  
16 the preliminary injunction matter. Do we have Mr. Kane or  
17 someone for CLO Holdco?

18 MR. KANE: Yes, Your Honor. John Kane for CLO  
19 Holdco, Ltd.

20 THE COURT: All right. What about for the Funds and  
21 Advisors? I guess we have a couple of law firms involved.  
22 Who do we have appearing for the K&L Gates firm?

23 MR. HOGWOOD: Good morning, Your Honor. This is Lee  
24 Hogewood with K&L Gates, and also with our firm appearing  
25 today is Emily Mather.



5

1 THE COURT: Okay. I didn't get Emily's last name.  
2 Could you repeat that?

3 MR. HOGEWOOD: I'm sorry, Your Honor. Emily Mather,  
4 M-A-T-H-E-R.

5 THE COURT: Thank you.

6 All right. For the Munsch Hardt team, do we have Mr.  
7 Rukavina or someone else appearing?

8 MR. RUKAVINA: Your Honor, good morning. This is  
9 Davor Rukavina. I represent all of the Defendants in the  
10 adversary except CLO Holdco.

11 Pursuant to the Court's instructions, Mr. Dondero is also  
12 present here in my conference room, so he is here. He is not  
13 on the camera, but he is here.

14 THE COURT: Okay. All right. And does Mr. Dondero  
15 have counsel, his individual counsel appearing today?

16 MR. WILSON: Your Honor, John Wilson for Jim Dondero.

17 THE COURT: Okay. Thank you. Do we have Creditors'  
18 Committee lawyers on the phone today?

19 MR. CLEMENTE: Yes, Your Honor. Good morning.  
20 Matthew Clemente; Sidley Austin; on behalf of the Official  
21 Committee of Unsecured Creditors.

22 THE COURT: All right. Thank you.

23 All right. Well, obviously, if any other lawyer is dying  
24 to chime in at some point today, I will consider letting that  
25 happen. But, again, I think we've got the parties who have

1 filed pleadings having appeared at this point. So, let's turn  
2 to the KERP motion. Mr. Pomerantz?

3 MR. POMERANTZ: Yes, Your Honor. Good morning again.  
4 On January 19th, the Debtor filed its motion for approval of a  
5 Key Employee Retention Program which would substitute out its  
6 annual bonus plan.

7 We have not received any opposition to the motion,  
8 although the United States Trustee did ask some questions  
9 which we are prepared to address in connection with the  
10 proposed proffer of Mr. Seery's testimony. I'm happy to make  
11 a full presentation of the motion to Your Honor, if you would  
12 like, or I could just present Mr. Seery's proffer, which I  
13 should -- which I believe will establish the factual predicate  
14 and the evidence to support the motion.

15 THE COURT: All right. Let's just go straight to the  
16 proffer, please.

17 MR. POMERANTZ: Okay. Thank you, Your Honor.

18 PROFFER OF TESTIMONY OF JAMES P. SEERY

19 MR. POMERANTZ: Mr. Seery is on the video today, and  
20 if he was called to testify he would testify that his name is  
21 James P. Seery, Jr. and that he is the chief executive officer  
22 and chief restructuring officer of Highland Capital  
23 Management.

24 He would also testify that he was one of the independent  
25 directors appointed to the Court on January 9th, 2020.

1 Because of his role with the Debtor, he is familiar with the  
2 company's day-to-day operations, including its -- the  
3 company's employee and wage benefit and bonus plans relating  
4 to the employees.

5 He would testify that he has been involved in the  
6 negotiation and drafting of the company's plan of  
7 reorganization, and is familiar with the expected operation of  
8 the Claimant Trust and Reorganized Debtor post-confirmation in  
9 connection with the plan.

10 He would testify that the plan generally provides for the  
11 monetization of the company's assets for the benefit of  
12 creditors and stakeholders, and he would testify that, as part  
13 of the plan process, he worked closely with DSI, the company's  
14 financial advisor, to assess both the costs of the Debtor's  
15 current employee base and the projected cost of operations in  
16 connection with the Reorganized Debtor and Claimant Trust  
17 following the effective date.

18 He would testify that, to ensure the continued smooth  
19 operation of the company in connection with the continuation  
20 and consummation of the plan for the benefit of all  
21 stakeholders, that he worked with DSI to determine the  
22 appropriate staffing needs necessary for the company's  
23 remaining operations.

24 He would testify that he analyzed the current employees to  
25 determine which, if any, would need to be continued to be

1 retained by the Debtor and operate during the Reorganized  
2 Debtor and Claimant Trust period following the effective date  
3 of the plan.

4 He would testify as part of that analysis he reviewed the  
5 roles and functions of the non-insider employees with respect  
6 to the services that they needed, and he reviewed the wages,  
7 benefits, and bonuses for those remaining non-insider  
8 employees necessary for those functions.

9 He would testify, that based upon his review, the company  
10 determined that it was in the best interests of the estate to  
11 terminate the existing annual bonus plan, as it was no longer  
12 necessary to effectively incentivize the remaining non-insider  
13 employees who would be terminated prior to being entitled to  
14 any further payments under the annual bonus plan.

15 He would testify that, instead, the company developed a  
16 new retention plan that was designed to incentivize the non-  
17 insider employees to remain with the company for as long as  
18 they are needed to assist in the effectuation of the plan.

19 He would testify that Mr. Waterhouse and Surgent, arguably  
20 two insiders of the Debtor, are not eligible for the retention  
21 plan, and that's not because there is any concern regarding  
22 their loyalty, but the Debtor is looking at ways to  
23 appropriately incentivize and compensate those people as  
24 appropriate in the future.

25 He would testify that there are a few persons on the list

1 of people who are part of the retention plan with a title that  
2 includes director or manager; however, he would testify that  
3 none of those individuals are corporate officers or directors  
4 of the Debtors -- the Debtor, and that the titles are for  
5 convenience only. He would testify that the individuals who  
6 are employed in these roles do not have any authority  
7 whatsoever to make any decisions on behalf of the Debtor.

8 He would testify that in connection with the new retention  
9 plan, the non-insider employees may be offered the opportunity  
10 to enter into a termination agreement with the company that  
11 will provide specified benefits and payments in return for the  
12 non-insider employee remaining as an employee in good standing  
13 with the company through the separation date.

14 He would testify that a key component of the retention  
15 plan is that non-insider employees will be entitled to the  
16 specific bonus payments provided that they do not voluntarily  
17 terminate their employment with the Debtor prior to the  
18 separation date and are not terminated for cause.

19 He would testify that that is in contrast to the existing  
20 or the prior annual bonus plan, which provided that non-  
21 insider employees would not receive their bonus payments if  
22 they were not employed by the Debtor on the vesting date for  
23 any reason except on account of disability, including  
24 termination without cause.

25 Mr. Seery would further testify that the retention plan is

1 being offered to approximately 53 employees, and the projected  
2 aggregate amount of payments under the retention plan is  
3 approximately \$1,481,000, which is \$32,000 approximately less  
4 than the amount that would have been paid to such employees  
5 under the annual bonus plan.

6 He would testify that the retention plan includes 20  
7 employees who are not entitled to benefits under the annual  
8 bonus plan. Fourteen employees are entitled to receive more  
9 under the retention plan than they would have received under  
10 the annual bonus plan.

11 With respect to the 20 employees I've previously mentioned  
12 who are not otherwise entitled to receive anything under the  
13 annual bonus plan, the vast majority of those -- 18 -- will be  
14 entitled to payments of \$2,500 each, and the other two  
15 entitled to payments of \$10,000 and \$7,500, respectively.

16 Mr. Seery would testify that he believes that these  
17 additional payments are reasonable in light of the current  
18 status of the company and the value to be added to the estate  
19 through the retention of these employees, and that this plan  
20 is more accurately and narrowly-tailored to achieve the  
21 company's reorganization goals.

22 On this basis, Your Honor, Mr. Seery would testify that he  
23 presented the proposed retention plan to the independent  
24 directors and they agreed with Mr. Seery's assessment that  
25 entry into the retention plan was in the best interests of the

1 estate and its creditors.

2 He would also testify that he had negotiations with the  
3 Creditors' Committee and its advisors regarding the retention  
4 plan and that the Committee is supportive of the retention  
5 plan.

6 And that would conclude my proffer of testimony from Mr.  
7 Seery, Your Honor.

8 THE COURT: All right. Mr. Seery, if you could say  
9 "Testing, one, two" so we can catch your audio and video,  
10 please?

11 MR. SEERY: Testing, one, two, Your Honor.

12 THE COURT: All right. There you are. Please raise  
13 your right hand.

14 JAMES P. SEERY, DEBTOR'S WITNESS, SWORN

15 THE COURT: All right. Thank you. Is there anyone  
16 who has questions at this time for Mr. Seery?

17 (No response.0

18 THE COURT: All right. Well, I'll just double-check  
19 with the Committee. It's been represented that you all are in  
20 support of this. Mr. Clemente, if you could confirm that on  
21 the record?

22 MR. CLEMENTE: That's correct, Your Honor. The  
23 Committee has no objection to the motion, so Mr. Pomerantz's  
24 statements are accurate.

25 THE COURT: All right. Anyone else?

1 MS. LAMBERT: This is Lisa Lambert for the United  
2 States Trustee. The U.S. Trustee has reviewed the actual data  
3 about the comparatives, and the U.S. Trustee, based on the  
4 stipulations, has no objection.

5 THE COURT: All right. Thank you. Anyone else?

6 All right. Well, the Court will approve this motion.  
7 First, while the notice was expedited, the Court finds that it  
8 was sufficient under the circumstances. We are many months  
9 into the case, it's been vetted by the Committee, and the  
10 Court is satisfied with the level of notice here.

11 The Court finds that this is a KERP that is justified by  
12 all the facts and circumstance of this case, to use the  
13 wording of Section 503(c)(3) of the Bankruptcy Code. There  
14 also appears to be a very sound business purpose justifying  
15 the proposed KERP. It appears to be reasonable in all ways,  
16 and fair under the circumstances, so I do approve it.

17 All right. So if you all will get the order uploaded  
18 electronically, I will promise to sign it promptly.

19 MR. POMERANTZ: We will do so, Your Honor. Thank  
20 you.

21 THE COURT: All right. So, the preliminary  
22 injunction. Mr. Morris, I heard you were going to be taking  
23 the lead on that, so go ahead.

24 MR. MORRIS: Indeed. Good morning, Your Honor. John  
25 Morris; Pachulski, Stang, Ziehl & Jones; for the Debtor.



1 THE COURT: Good morning.

2 MR. MORRIS: A few items before I give what I hope  
3 will be an informative opening statement. I trust that Your  
4 Honor has not had the opportunity, because it was just filed a  
5 moment ago, to see that the Debtor filed on the docket notice  
6 of a settlement with CLO Holdco, Ltd., one of the Defendants  
7 here today.

8 THE COURT: I have not seen that. Okay.

9 MR. MORRIS: Right. So you'll find that at Docket  
10 1838.

11 THE COURT: Okay.

12 MR. MORRIS: It really is a very simple settlement,  
13 Your Honor. In exchange for the withdrawal of CLO Holdco's  
14 objection to the Debtor's plan of reorganization, the Debtor  
15 is dismissing CLO Holdco from this adversary proceeding with  
16 prejudice. There are, you know, some other bells and whistles  
17 there, the most important of which to the Debtor is simply  
18 that, under the CLO management agreements, most of them but  
19 not all of them require that a level of cause be established  
20 before the contracts can be terminated, and CLO Holdco has  
21 agreed that, before it seeks to terminate a contract for  
22 cause, there will be a gating provision or a gatekeeping  
23 provision that requires them to come to this Court to simply  
24 establish whether or not there is a colorable claim -- not for  
25 a determination on the merits, but simply to protect the

1 Debtor from frivolous lawsuits.

2 So that's really the sum and substance of it. Mr. Kane is  
3 on the line now, and if I've either inaccurately or  
4 incompletely characterized the settlement, I'm sure he'll take  
5 the opportunity to supplement the record. But we don't see  
6 any need, really, to go through a full 9019 motion here.  
7 There's no releases. There's no exchange of money. It's the  
8 withdrawal of a plan objection in consideration for the  
9 dismissal of an injunctive proceeding.

10 So we did want to alert you to that. And as a result,  
11 there was one witness that we intended to call today, Grant  
12 Scott. Mr. Scott is the director of CLO Holdco. And with the  
13 resolution of the issues between the Debtor and CLO Holdco, we  
14 have no intention of calling Mr. Scott today. But I'd like to  
15 give Mr. Kane an opportunity to be heard just in case he's got  
16 anything to add.

17 THE COURT: All right. Mr. Kane, can you confirm?  
18 Do you have anything to change about what you heard?

19 MR. KANE: Your Honor, I do not. The settlement  
20 agreement speaks for itself. We did reach an agreement with  
21 Debtor's counsel and the Debtor yesterday evening, fairly late  
22 in the evening. Mr. Morris's synopsis of the proposed  
23 settlement is accurate. The Debtor has agreed to dismiss CLO  
24 Holdco from the preliminary injunction adversary proceeding  
25 with prejudice.

1 THE COURT: All right. Well, thank you. I've pulled  
2 it up on my screen. It's very short and to the point. And I  
3 agree with the comment of Mr. Morris that I don't think a  
4 formal 9019 motion is required here, given no consideration is  
5 going back and forth, or releases. It's just exactly as you  
6 described orally. So, I appreciate that. It simplifies a  
7 little bit what we have set today. And we will accept this  
8 settlement as being in place as we roll forward. All right?  
9 Thank you.

10 MR. MORRIS: Thank you, Your Honor.

11 So, before I get to the substance of the argument, I would  
12 like to take care of some housekeeping items relative to  
13 today's proceedings.

14 THE COURT: Okay.

15 MR. MORRIS: You know, this has been a bit of a  
16 challenge for me personally, and it's going to be a little bit  
17 of a challenge today for Ms. Canty, my assistant, in part  
18 because it's almost like Groundhog's Day. This is, I think,  
19 the third time that we're covering some of the same issues.  
20 We had covered them the first time on December 16th in  
21 connection with what I'll now just simply refer to as the  
22 Defendants, the Defendants' motion to try to limit the Debtor  
23 from trading the CLO assets. We heard a lot of what we're  
24 going to hear today again on January 8th in connection with  
25 the preliminary injunction motion against Mr. Dondero. And so

1 there's already a ton of evidence in the record. We do  
2 believe that we need to present our evidence today, but one of  
3 the challenges that we'll face, and I think we'll be able to  
4 do it efficiently, Your Honor, is there may just be some back  
5 and forth between various documents. But everything's gone  
6 pretty smoothly, and I'm optimistic we'll get through that  
7 part of it today.

8 So I want to deal with the exhibits themselves, Your  
9 Honor. As you may have seen, there have been a number of  
10 different filings relating to the Debtor's exhibits for this  
11 particular motion, and I just want to go through the exhibits  
12 and make sure that we're all on the same page here. I want to  
13 tell the Court exactly what happened and why and where we are  
14 today.

15 The Debtor timely filed its original witness and exhibit  
16 list on January 22nd. They filed that witness and exhibit  
17 list at Docket 39 in this Adversary Proceeding 21-3000. The  
18 exhibit list referenced Exhibits A through I'll just say  
19 AAAAA. It was a lot of exhibits, and somebody had the wise  
20 idea to convert them to numbers, but it wasn't me, so I can't  
21 take credit. But we're left with letters, and they go from A  
22 through AAAAA.

23 After filing that initial exhibit list, we realized that  
24 --

25 (Interruption.)

1 THE COURT: All right. Does someone have their  
2 device unmuted? Okay. It went away. Go ahead, Mr. Morris.

3 MR. MORRIS: Thank you. So, shortly after filing  
4 that initial exhibit list, we realized that we forgot to file  
5 among the exhibits AAAAA. So at Docket #40 in the adversary  
6 proceeding, the Court can find Debtor's Exhibit AAAAA.

7 And then we're going to -- I'm going to refer in a few  
8 minutes -- I'm going to use in a few minutes some  
9 demonstrative exhibits, and I'm going to use them again with  
10 Mr. Seery. And these exhibits concern trading in AVYA and SKY  
11 securities that you've heard about previously.

12 But I'm pointing that out now because I'm kind of old  
13 school, Your Honor, and I won't use a demonstrative exhibit if  
14 it doesn't have the evidence in the record. And what we  
15 realized, Your Honor, is we made two additional mistakes on  
16 Friday with all the papers that we filed. The backup for  
17 these demonstratives was mistakenly included on the exhibit  
18 list for the confirmation hearing as opposed to the  
19 preliminary injunction hearing. That was error number one.  
20 And error number two, we hadn't redacted the information to  
21 show only the SKY and AVYA.

22 And that's why, Your Honor, at Docket #48, you will find  
23 our amended exhibit list that includes what we have identified  
24 as Exhibits BBBB as in boy through SSSS as in Sam. And  
25 those exhibits, Your Honor, are the backup to the

1 demonstrative exhibits. I don't expect to use them at all,  
2 but I do believe strongly that one should not use a  
3 demonstrative exhibit unless the evidence is in the record to  
4 support it, and now it is.

5 So that's why, Your Honor, I do appreciate your court  
6 staff. I do appreciate Your Honor. I think you either had  
7 before you and you may have signed an order on redacting.  
8 This is what it was all about. It was just to make sure we  
9 had the proper evidence in the record, so I appreciate that.

10 At this time, Your Honor, I think, just because I'll be  
11 referring to it in the opening, the Debtor would move for the  
12 admission into evidence of Exhibits A through SSSSS.

13 THE COURT: All right. Is there any objection?

14 MR. RUKAVINA: Your Honor, there is. Your Honor, I  
15 object to UUUU. I'll object to VVVV as in Victor. I object  
16 to AAAAA. That's it, Your Honor.

17 I will note that there are several exhibits in here of  
18 relevance to CLO Holdco that may not be relevant to my  
19 clients, but those are my limited objections for now.

20 THE COURT: All right. Before we ask the nature of  
21 your objection, let me ask Mr. Morris: Shall we just --

22 MR. MORRIS: Yeah.

23 THE COURT: -- carve these out for now, and then if  
24 you want to offer them the old-fashioned way, we'll hear the  
25 objection then?

19

1 MR. MORRIS: Yes, although I can make it very clear  
2 that UUUU should not be in there precisely because it's  
3 demonstrative. We had talked that yesterday and I agreed; I  
4 just forgot that. UUUU should not be part of the record.

5 THE COURT: Okay. And so you'll just decide later do  
6 you want to offer VVVV and AAAAA the old-fashioned way?

7 MR. MORRIS: Correct.

8 THE COURT: All right. So, for the record, I am  
9 admitting by stipulation -- with three exceptions I'll note --  
10 all of the exhibits of the Debtor that appear at Exhibits 39  
11 and, well, and 48. And we're carving out of that admission  
12 UUUU, VVVV, and AAAAA, which actually appears at Exhibit --  
13 Docket Entry 40. Those are not admitted at this time.

14 (Debtor's Exhibits A through SSSSS, exclusive of Exhibits  
15 UUUU, VVVV, and AAAAA, are received into evidence.)

16 THE COURT: All right. Go ahead, Mr. Morris.

17 MR. MORRIS: Yes.

18 MR. RUKAVINA: Well, Your Honor, while we're talking  
19 about housekeeping -- Mr. Morris, I apologize. Is there more  
20 housekeeping?

21 MR. MORRIS: I'd like to continue. I was going to  
22 describe the witnesses.

23 OPENING STATEMENT ON BEHALF OF THE DEBTOR

24 MR. MORRIS: So, Your Honor, the Debtor is going to  
25 call three witnesses today. The first witness will be Mr.

1 Dondero, the second will be Jason Post, and then the third  
2 will be Mr. Seery.

3 Obviously, Mr. Dondero and Mr. Seery are very familiar to  
4 the Court and they will cover much but not all of the same  
5 ground that you've heard previously.

6 Mr. Post, I believe, is a new witness appearing in this  
7 court for the first time. I understand that he is the chief  
8 compliance officer of each of the Debtors [sic]. He had  
9 worked at Highland Capital Management, the Debtor, for more  
10 than a decade, I believe, but moved over to NexPoint to work  
11 with Mr. Dondero shortly after Mr. Dondero resigned from  
12 Highland Capital on or about October 10th last year.

13 So those are the three witnesses that we plan to present  
14 today, and I'd like to describe briefly kind of what we think  
15 the evidence will show.

16 The theme from our perspective here, Your Honor, is that  
17 this is a case that is about power and not rights. The Debtor  
18 brings this motion for preliminary injunction in order to  
19 protect itself from the interference of Mr. Dondero and the  
20 Defendants, entities that there will be no dispute he owns and  
21 controls.

22 You may have read in the papers, and I suspect you will  
23 hear today from the Defendants, the clarion call for  
24 contractual rights and the need for this Court to protect  
25 their contractual rights. This is a red herring, Your Honor.



1 There are no contractual rights at issue here. What Mr.  
2 Dondero and the Defendants really want is to maintain control,  
3 or at least to deny Mr. Seery from exercising the Debtor's  
4 valuable contractual rights. If there are any contractual  
5 rights at issue here, it is the Debtor's. The Debtor is the  
6 party to the CLO management agreements, and it's those very  
7 rights that are being infringed upon.

8 This was supposed to have been resolved 53 or 54 weeks ago  
9 now, Your Honor, when Mr. Dondero agreed and this Court  
10 ordered that Mr. Dondero could not use related entities to  
11 terminate any of the Debtor's agreements. There is no dispute  
12 that each of the Defendants is a related entity for purposes  
13 of the January 9th order, since Mr. Dondero and Mr. Norris  
14 have already testified that the Defendants are owned and/or  
15 controlled by Mr. Dondero.

16 Notwithstanding the plain language of the January 9th  
17 order, which Mr. Dondero not only agreed to, but it may be one  
18 of the very few orders in this case that he hasn't appealed,  
19 notwithstanding the plain language, Your Honor, he persists,  
20 and that is why we are here.

21 How do we know that this is about power and not rights?  
22 How do we know that everything that's going to be described  
23 for you, what the evidence is going to show that this is about  
24 power and not rights, is very simple. Mr. Dondero and Mr.  
25 Post will testify -- I'm just going to give four, five, six

1 examples here -- are going to testify that Mr. Seery's AVYA  
2 trades were not in the Funds' best interests. It's an  
3 irrelevant point, Your Honor. There is no contractual right  
4 that gives them the ability to terminate because they don't  
5 like trades that are being made. They can sell. If they  
6 don't like it, they can sell. That's what's really funny  
7 about this.

8 But what's -- what makes it even more clear that this is  
9 about power and not rights is the evidence is going to show  
10 that Mr. Dondero sold AVYA shares throughout 2020. He sold  
11 those shares right up until the day he resigned. And yet six  
12 days after resigning, NexPoint sends a letter saying, Don't  
13 sell any assets.

14 Ms. Canty, can we put up Exhibit number -- Demonstrative  
15 Exhibit 1, please?

16 Okay, Your Honor. We have redacted this to shield from  
17 public disclosure the name of each fund that's trading, but  
18 the backup, as I alluded to earlier, in Exhibits BBBBB through  
19 SSSSS, some portion of those documents, that's where these  
20 demonstrative figures come from.

21 And as you can see, beginning on January 29, 2000,  
22 continuing through the bottom of the page, October 9th, 2020,  
23 when Mr. Dondero left Highland Capital, he traded millions and  
24 millions and millions of dollars in AVYA stock.

25 Can we go to Demonstrative Exhibit #2, please?

1 This chart is really -- no, I apologize if I -- the other  
2 one. The AVYA trading activity chart. Yeah.

3 This one is really interesting, Your Honor, because it  
4 shows the trading throughout the year of AVYA stock, and you  
5 can see the brown bars there represent Mr. Dondero's trades.  
6 And you can see just how many trades there are. There are  
7 over a million shares, I think, if you added it up. They're  
8 represented by the brown bars. You can see him selling AVYA  
9 stock throughout the period, sometimes at a price really near  
10 its bottom.

11 And then Mr. Seery tries and actually does sell some stock  
12 toward the end of the year. That's the green bars on the  
13 right. A very, very tiny amount compared to Mr. Dondero. And  
14 he sells it at a substantially greater price than Mr. Dondero  
15 sold the AVYA stock. And yet they're here telling you, Your  
16 Honor, that somehow Mr. Seery is mismanaging the CLOs and they  
17 disagree with what he's doing and he's not acting in the best  
18 interests of the investors. That's what they want -- but this  
19 is what the evidence shows, Your Honor.

20 With respect to SKY, if we could go to the next slide,  
21 please.

22 So this is SKY. Now, Mr. Dondero did not trade any SKY  
23 securities, but Mr. Seery did. And this was another security  
24 -- and we'll get to the evidence in a moment -- that Mr.  
25 Dondero interfered with and tried to stop. So Mr. Seery

1 succeeded sometimes and he was stopped sometimes, but the  
2 point is, Your Honor, look at the price that Mr. Seery sold.

3 And remember, you heard this before and you're going to  
4 hear it again. Nobody from the Defendants ever asked Mr.  
5 Seery, Why do you want to trade this? Not that they even had  
6 to. Not that Mr. Seery needs to defend himself, frankly.  
7 He's got the authority under the management contracts to act  
8 in the way that he thinks is in the best interest. But look  
9 at this chart. He made these sales, Your Honor, at more than  
10 twice the price of the bottom.

11 How can they have any credibility? How can Mr. Dondero  
12 and Mr. Post come into this courtroom and assert that Mr.  
13 Seery is doing anything other than a fabulous job? He is  
14 selling at the top of the market. Because they think that  
15 some high -- in the future, it's going to go higher? It's  
16 prudent, Your Honor.

17 Mr. Seery is going to tell you the work that he did. He  
18 is going to give you the rationale for his decisions. And the  
19 only conclusion that I hope and believe the Court will be able  
20 to reach is that these were not only rational decisions but  
21 they were prudent, taking some money off the table when the  
22 stock was near its high.

23 That's how we know, this is more evidence how we know this  
24 is about power. It's not about rights. It's not about  
25 justice. It's not about anything having to do with anything

1 other than Mr. Dondero wanting to maintain control.

2 How else do we know? What other evidence is there that  
3 this is about power and not rights? Again, the timing. The  
4 calendar here is going to be very, very important. The first  
5 demand from NexPoint from the Defendants that Mr. Seery stop  
6 trading came on October 16th. It was less than a week after  
7 Mr. Dondero -- like, where does this come from? There's no  
8 right to demand stopping of trading. You don't get to do it.  
9 And they're going to minimize it. They're going to spend the  
10 whole day, Your Honor, either -- either focusing on the law or  
11 trying to minimize. And they'll say, well, it was just a  
12 request, Your Honor. And if it was a third-party request, I  
13 bet Mr. Seery -- Mr. Seery is going to tell you, if it was a  
14 third party, he wouldn't care. But when you put all of this  
15 together, it is oppressive. It is an exertion -- it's an  
16 attempt at exertion of control. That's how it's perceived and  
17 that's actually what happened.

18 Do you need more evidence? Again, they'll talk about  
19 termination for cause and how they have the right and the  
20 Court -- you, Your Honor, don't have the power to infringe  
21 upon their contractual rights. But there will be no evidence.  
22 Absolutely none. Mr. Post is going to tell you, in fact, that  
23 he has no evidence of any breach, of any default, of any  
24 reason whatsoever that cause might exist for the termination  
25 of these contracts. That's how you know this is about power

1 and not rights.

2 Last point on the issue of power versus rights: Who were  
3 the counterparties to the CLO agreements? Did the CLO Issuers  
4 -- where are they? They're not here. They're not here to  
5 tell the Court that Mr. Seery is breaching his duty. They're  
6 not here to tell the Court that the Debtor is in default. In  
7 fact, what Mr. Seery is going to tell you, and it won't be  
8 rebutted, is that the CLO Issuers are close to finalizing a  
9 deal that will permit the Debtor to assume the CLO management  
10 contracts.

11 Mr. Post or Mr. Dondero might get up on the stand today  
12 and say, oh, because people have left the firm, that somehow  
13 they don't have the ability to service the contracts anymore.  
14 You know who doesn't believe that? The contractual  
15 counterparty, the Issuers. It's about power, Your Honor.  
16 It's not about rights.

17 There is substantial evidence that warrants the imposition  
18 of a preliminary injunction, substantial evidence, much of  
19 which you've heard already.

20 The October and November letters demanding or requesting  
21 that the Debtor halt trades. There's no right to that.

22 Mr. Dondero's interference with the support of Joe Sowin,  
23 the Advisors' trader, around Thanksgiving, when they actively  
24 moved in. And it's in the emails. It's in the record. We'll  
25 put in the record again.

1 And then he made the threat to Thomas Surgent -- Mr.  
2 Dondero made the threat to Thomas Surgent about potential  
3 personal liability.

4 The ridiculous -- remember the ridiculous motion that was  
5 heard on December 16th, a motion so devoid of factual or legal  
6 basis that the Court granted the Debtor a directed verdict and  
7 dismissed the motion as frivolous? Notably, neither Mr.  
8 Dondero nor Mr. Post testified at that hearing. Yet, within a  
9 week, Your Honor -- the hearing was on a Wednesday. The  
10 hearing was on Wednesday, December 16th. The Court entered  
11 the order on Friday, December 18th. On Monday, December 21st,  
12 the next business day, Mr. Dondero and Mr. Post and the  
13 lawyers for the Defendants held conference calls to figure out  
14 what to do next.

15 And the very next day, the evidence is going to show --  
16 it's already in the record -- Mr. Dondero again actively  
17 stopped Mr. Seery's trades from being effectuated. They sent  
18 their first letter. This is less than a week after that  
19 hearing, Your Honor. They sent another letter asking the  
20 Debtor -- again, they requested -- minimize -- this is what  
21 you're going to hear: Well, we just sent a letter requesting  
22 no more trading.

23 What happened the next day, December 23rd? They send  
24 another letter and they say, We're thinking about terminating  
25 the contracts. Now we think we're going to terminate the

1 contracts. And we just want to let you know we're thinking  
2 about terminating the contracts.

3 And we call them -- and Mr. Seery is going to testify to  
4 this -- we say, What are you doing? Every time we just said,  
5 Please withdraw your letter. There's no basis for doing this.  
6 Leave us alone and let us do our job. They wouldn't -- they  
7 refused to withdraw the letter.

8 And finally -- again, Mr. Seery will testify to this -- we  
9 told them, If you think you really have a basis for  
10 terminating the contract, make your motion to lift the stay.  
11 And if you don't, the Debtor will file the motion that brings  
12 us here today.

13 And that's how we got here, because they continued to  
14 interfere with the trading. They continued to send these  
15 specious letters that are implicit threats. Mr. Seery is  
16 going to tell you that every one of these, he -- is an  
17 implicit threat. We asked them, Just withdraw the letters and  
18 stop it. We asked them to make their own motion if you think  
19 so strongly of it. They wouldn't do that, either. They just  
20 want it hanging out there. They just want it all hanging out  
21 there over Mr. Seery's head so that he knows somebody's --  
22 somebody's watching and somebody's planning, you know, to take  
23 action.

24 It's not right, Your Honor. They have no right to any of  
25 this. There's nothing in the contract that allows them to



1 make even a good-faith -- to make any claim that they have  
2 cause to terminate the contract. They have no right under any  
3 circumstances to stop Mr. Seery from trading.

4 What they are going to tell you is there's no agreement  
5 between the Advisors and the Debtor that requires the Advisors  
6 to execute the trades. And they're right about that. They're  
7 actually right about that. But here's the thing, Your Honor.  
8 What Mr. Seery is going to tell you is that Advisors has the  
9 trading desk. For more than a decade, they executed the  
10 trades. Through the entirety of this bankruptcy case, until  
11 Mr. Dondero left Highland, they executed the trades. Even  
12 after Mr. Dondero left Highland in October, they continued to  
13 execute the trades. And on December 22nd, they fold their  
14 hands and they say, Nope, I don't care about the course of  
15 dealing, I don't care what impact it has, you can't make me do  
16 it. So Mr. Seery has tried end-arounds, and that'll be in the  
17 record, too, and that's when the threats to Surgent come.  
18 That's when the threat to Surgent come, when we try to do the  
19 workaround. Cannot do it.

20 This is just not right, Your Honor. It's just not right.  
21 There's order -- there's the January 9th order. There was the  
22 TRO that was in effect that we're going to hear about again,  
23 because that TRO not only applied to Mr. Dondero, it prevented  
24 him from conspiring with or even encouraging a related entity  
25 from engaging in prohibited conduct. And that prohibited

1 conduct, as Your Honor knows, because it's your order, is  
2 plain and as unambiguous as can possibly be: Don't interfere  
3 with the Debtor's business. It's all we're asking for. It's  
4 the only reason we're here today.

5 Interestingly, Your Honor, probably the best piece of  
6 evidence that I'll put in front of you today are going to be  
7 the words out of Mr. Post's mouth, because basically what he's  
8 going to tell you is that, as chief compliance officer, he has  
9 never once in the history of his employment told Mr. Dondero  
10 to stop. In fact, what he's going to tell you is that he  
11 defers to the investment professionals, and that but for the  
12 TRO that is consensually in place today, it would depend on  
13 the facts and circumstances as to whether or not he actually  
14 does anything as chief compliance officer to stop this  
15 conduct. Depends on the -- maybe he can explain to Your Honor  
16 what facts and circumstances he thinks, as chief compliance  
17 officer, would allow the Advisors to interfere with the  
18 Debtor's business. It'll be interesting to hear him answer  
19 that question.

20 That's all I have, Your Honor. I look forward to  
21 presenting the evidence today. I'd like this done once and  
22 for all. It's time to move on. And the Debtor -- the Debtor  
23 is in bankruptcy. Your Honor, I think, has every power, every  
24 right, and frankly, you know -- I feel very strongly about  
25 this, obviously, Your Honor -- the Debtor needs the breathing

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1 space and to be left alone so it can do its job. And we'll  
2 respectfully request at the end of this that the Court enter  
3 an order allowing it to do so.

4 Thank you, Your Honor.

5 THE COURT: All right. We were hearing some  
6 distortion there, I'm not sure where it was coming from, but  
7 we'll try to keep it reined in.

8 Mr. Rukavina, your opening statement.

9 MR. RUKAVINA: Your Honor, thank you. Can the Court  
10 hear me?

11 THE COURT: Yes.

12 OPENING STATEMENT ON BEHALF OF CERTAIN DEFENDANTS

13 MR. RUKAVINA: Your Honor, I think it's important  
14 first to note a few obvious things. One, what we're talking  
15 about today is enjoining future rights, future rights under a  
16 contract. Hearing Mr. Morris's opening, it sounds like we're  
17 trying a breach of contract case. There is no declaratory  
18 relief sought for whether there is grounds for a breach of  
19 contract case. And prior to assumption and prior to  
20 confirmation, the automatic stay applies.

21 So let me be clear that what they're asking the Court to  
22 do today is to excise from these contracts our rights in the  
23 future, effectively for all time, as I'll explain.

24 The second thing that merits real consideration is that it  
25 is the Funds, Your Honor, not the Advisors, it is the Funds

1 that have the right to remove the Debtor as manager.

2 Those Funds, as you will hear, have independent boards.

3 Mr. Dondero doesn't own those Funds. He's not on those  
4 boards. He doesn't control them.

5 When Mr. Morris talks about Mr. Norris's prior testimony,  
6 that testimony was limited to the Advisors. And yes, Mr.  
7 Dondero does own the Advisors, and Mr. Dondero, while I won't  
8 say controls the Advisors, certainly has a lot of input. That  
9 is not the case for the Funds, which are the ones with the  
10 contractual powers here to remove the Debtor.

11 You will hear that those -- that that board or those  
12 boards meet frequently, they have independent counsel, and  
13 they take separate actions, including very recently where they  
14 did not do something that was advised and acted independently.

15 And the third thing that makes this case different and  
16 that all of us should bear in mind is that we're talking today  
17 about other people's money. There's more than one billion  
18 dollars of investment funds, retirement funds, pension funds,  
19 firefighter funds, school funds, wealthy individuals, having  
20 nothing in the world to do with Mr. Dondero or anyone in this  
21 case.

22 So what we're talking about here today, Your Honor, is  
23 that if my retirement manager files bankruptcy, that I for all  
24 time would be effectively enjoined from removing him, no  
25 matter what he may do in the future, just because he needs

1 that revenue.

2 That is an absolutely inappropriate use of a preliminary  
3 injunction. It is the modification of a contract that the  
4 Debtor seeks to assume, and there is going to be no evidence  
5 on the underlying elements that the Court must consider.

6 I say that, Your Honor, because I'm new to -- I'm late to  
7 this case but I have studied in detail what Your Honor did in  
8 the *Acis* case. And I think that we have to qualitatively  
9 differentiate today from *Acis*. In *Acis*, there were  
10 allegations of fraudulent transfer. When Your Honor enjoined  
11 future actions, I believe in part it was because the  
12 legitimate owner of those rights might not have been having  
13 those rights.

14 So that was a very important difference. Here, there's no  
15 question that we have more than billion dollars of other  
16 people's funds at issue.

17 Also in *Acis*, as confirmed by the District Court, there  
18 was the exercise of an optional redemption right, which could  
19 have very well been used as a weapon to strip the manager of  
20 its rights. That's not the case here today. We are talking  
21 about removing the Debtor in the future -- not today, not  
22 prior to assumption, in the future -- for such things as if  
23 the Debtor commits fraud, if Mr. Seery is indicted for  
24 felonies, if the Debtor absconds with our funds. We are  
25 talking about potential hypothetical actions in the future

1 that are not even ripe based on the Debtor's potential  
2 wrongful actions, not based anything on our motivations or our  
3 intentions.

4 So this is a different case than Your Honor has heard so  
5 far in these cases. And what it boils down to, Your Honor, is  
6 will the Court give judicial immunity to the post-assumption,  
7 post-confirmation Debtor over the next two or three years as  
8 it manages and liquidates more than a billion dollars of other  
9 people's funds? It is their money at issue.

10 So, in order to do this, the Debtor first has to tell Your  
11 Honor that it has a likelihood of merits on the success [sic]  
12 of some claim. The Debtor cannot just come to you -- because  
13 the Debtor knows Your Honor's opinion on 105(a) and the  
14 Supreme Court law -- and the Debtor cannot just say, Judge,  
15 please give us an injunction because it's convenient or  
16 because we don't want to comply with our obligations. So they  
17 concoct a tortious interference claim. They argue that there  
18 is an automatic stay violation, which, as Your Honor knows,  
19 all of us bankruptcy lawyers take most seriously. And they  
20 argue that, well, whatever Mr. Dondero has been enjoined from  
21 doing, somehow we *a priori* are also enjoined. Basically, an  
22 alter ego with no facts, law, trial, or due process.

23 On the tortious interference, Your Honor will hear  
24 absolute evidence that cannot be refuted that all that we did,  
25 all that we did was we refused, our employees refused to make

1 a ministerial entry into a computer program of two trades that  
2 Mr. Seery authorized. Those trades closed exactly as Mr.  
3 Seery wanted. Those trades closed, were executed, before Mr.  
4 Seery asked our employees to do his bidding. And the reason  
5 why our employees were instructed not to do what Mr. Seery  
6 wanted was because our chief compliance officer looked at it,  
7 those employees looked at it, and they all said, What is this?  
8 Our internal protocols were not followed. We don't know  
9 anything about these trades. We have fiduciary duties, we  
10 have SEC obligations, and Mr. Seery has his own employees whom  
11 he can instruct to enter these two trades into the computer  
12 and our employees aren't going to do it. It's as simple as  
13 that.

14 Mr. Dondero did not command that decision. Mr. Dondero  
15 did not instruct that decision.

16 Our employees not doing what Mr. Seery requested of them  
17 is not tortious interference. It is not interference as a  
18 matter of law. There was no breach of contract as a result.

19 So the two elements -- two of the elements required for  
20 tortious interference, there will be zero evidence on. But in  
21 the bigger picture, what they're talking about again is  
22 restraining our rights in the future. And whether -- whether  
23 we are party to these contracts or a third-party beneficiary,  
24 it doesn't matter, because we are not a stranger to these  
25 contracts. These contracts expressly give us rights. And a

1 party exercising their right under a contract, it could be  
2 breaching that contract, but it cannot be tortious  
3 interference as a matter of law.

4 And if Your Honor is concerned about us tortiously  
5 interfering in the future, then the Court should enjoin us  
6 from tortious interference in the future, not excise from the  
7 contract the remedies that the Debtor must accept if it wants  
8 to assume these contracts.

9 Moving to the automatic stay issue, the sole and exclusive  
10 argument for why we violated the stay is because our counsel,  
11 a seasoned, gentlemanly bankruptcy lawyer of many years'  
12 experience, sent two letters to seasoned veteran bankruptcy  
13 lawyers for the Debtor. Communications. Communications  
14 amongst counsel.

15 The first, the December 22nd letter, is a request: Okay,  
16 we lost in front of Judge Jernigan, Judge Jernigan called our  
17 motion frivolous, we get that, but we ask you to please stop  
18 trading until the plan is confirmed. A request which the  
19 Debtor ignored. Or that's not true, didn't ignore: refused  
20 to comply with.

21 The second letter, a day later, after various  
22 communications, was: Okay, we are going to initiate the  
23 process of terminating you as the servicer.

24 Mr. Dondero had nothing in the world to do with these  
25 letters. Mr. Dondero did not direct these letters. This was



1 professional advice from outside counsel and the independent  
2 boards of the Advisors believing that their fiduciary duty  
3 compelled that.

4 And guess what, that letter even said: subject to the  
5 automatic stay. You heard from Mr. Morris that they basically  
6 said, File your stay motion.

7 Our follow-up letter clarified anything that we might do  
8 is subject to the automatic stay. We never said we're going  
9 to act in a way that the stay doesn't permit. We said we're  
10 going to come to this Court first.

11 But even all that, all those communications, while it may  
12 be interesting, are irrelevant, because we never took any  
13 action. You will hear that we never communicated with the  
14 CLOs, the Trustees, or the Issuers, anything like we went over  
15 with the Debtor, anything like, Please start the process of  
16 removing the Debtor. We have done nothing of the sort, we  
17 will do nothing of the sort, precisely because of the  
18 automatic stay.

19 So I equate this, Your Honor, to your average home lender  
20 whose lawyer sends a letter to the borrower saying, You don't  
21 have insurance; we're going to start the process of  
22 foreclosure. You're past due on your post-petition adequate  
23 protection payments; we're going to start the foreclosure  
24 process; we're going to go seek a list of stay. That is not  
25 actionable. It is not a stay violation. Those are

1 communications, not actions. And that is precisely what  
2 seasoned professional counsel should be doing.

3 And now, Your Honor, we move to the Mr. Dondero issue.  
4 The argument is, well, on January the 9th, Mr. Dondero,  
5 apparently for all time, in perpetuity, agreed that he will  
6 not cause the related entities to terminate these agreements.  
7 And then the argument is, well, the Court entered a TRO  
8 against Mr. Dondero and the Court entered a preliminary  
9 injunction against Mr. Dondero. Okay?

10 I don't see where the problem is. Mr. Dondero is  
11 prohibited from causing us to terminate these agreements.  
12 There are many ways, with independent boards, that Mr. Dondero  
13 has nothing to do with that. And he will have nothing to do  
14 with that in the future. So if the concern is enjoining us  
15 because of an injunction against Mr. Dondero, enjoin Mr.  
16 Dondero. Just like if the concern is that we're going to  
17 tortiously interfere, you enjoin us from tortious  
18 interference. Or if we're going to violate the stay, enjoin  
19 us from violating the stay. But do not for all time assume  
20 that any right that we may exercise in the future will  
21 necessarily be tainted and the corrupt product of Mr.  
22 Dondero's instructions. You will see today on the evidence  
23 that that has not happened and it will not happen.

24 And whatever Mr. Dondero may have agreed to, we are  
25 separate entities. Again, the Funds have -- are not

1 controlled or owned, and Mr. Dondero is not on the board. So  
2 whatever he may have agreed to is between the Court and the  
3 Debtor and him, but he never agreed to that on behalf of the  
4 Funds. He never agreed to that on behalf of the Advisors, who  
5 have their own independent fiduciary duties and duties under  
6 the law.

7 So, Your Honor, there will be no substantial likelihood of  
8 success on the merits. There will be no likelihood of success  
9 on the merits. And I'm talking about the post-assumption,  
10 post-confirmation time frame. The issue is fundamentally  
11 different pre-assumption and pre-confirmation. But post-  
12 assumption and post-confirmation, the Debtor will not show a  
13 likelihood of success on the merits. The Debtor will not show  
14 any irreparable injury. None.

15 Mr. Seery will testify that managing these agreements for  
16 the coming couple or three years will have some value to the  
17 Debtor. He doesn't know what the profitability of that is to  
18 the Debtor. You will hear that, in fact, managing these  
19 contracts for the next two years does not bring any  
20 profitability to the Debtor. The Debtor will lose money  
21 managing of them. But whatever damages there are are monetary  
22 damages, and monetary damages are not an irreparable injury as  
23 a matter of law.

24 Now, the Debtor says, well, the Court can enter an  
25 injunction in the aid of restructuring, but this injunction

1 will happen after restructuring.

2 On the balance of harm and public interest, Your Honor, I  
3 think we're dealing with more than a billion dollars of clean,  
4 innocent third-party funds. The balance of harm here weighs  
5 against granting this injunction. If we try to do anything in  
6 the post-confirmation world, the Debtor has all of its rights  
7 and remedies to contest what we do. If we do it wrong, we're  
8 liable in contract or in tort, there's monetary damages, and  
9 the Debtor has already successfully organized.

10 But if the Debtor does something wrong in the future and  
11 we cannot take action to stop a gross mismanagement or a  
12 denution [sic] of the Debtor or an abscondence with funds,  
13 then think about the harm to the innocent investors here.  
14 Because if we even go to court, your Court, any court, we will  
15 be in violation of a federal court injunction.

16 Your Honor, this is not the appropriate purpose of an  
17 injunction for the preservation of the status quo. The status  
18 quo, by definition, cannot extend post-assumption or post-  
19 confirmation. This is not a proper exercise of equity. We  
20 have done nothing wrong, we have threatened to do nothing  
21 wrong, and we will do nothing wrong to justify forever being  
22 prejudiced and enjoined from exercising our contractual and  
23 statutory rights.

24 Your Honor, this TRO extends through February the 15th.  
25 We asked the Debtor to continue this hearing. We asked the

1 Debtor to go to our independent boards and seek approval of  
2 the same settlement that the Debtor has with CLO Holdco, which  
3 we learned about last night. We simply haven't had the time  
4 to get those boards aligned up and present a settlement to  
5 them. We're trying to put together a competing plan.

6 Your Honor, there is no reason to go forward today except,  
7 like Mr. Morris said, power. Power. Mr. Seery's power, Your  
8 Honor. Not ours. Mr. Seery's power in perpetuity or for  
9 judicial immunity, get out of jail free card. Thank you.

10 THE COURT: All right. Mr. Morris, you may call your  
11 witness.

12 MR. MORRIS: Yeah. I just want to make a motion to  
13 strike the notion of a get out of jail free card. I  
14 appreciated everything counsel had to say, but I think that's  
15 a little -- a little over the top.

16 We call Mr. James Dondero, please.

17 THE COURT: Mr. Dondero, --

18 MR. RUKAVINA: Your Honor, bear with me.

19 THE COURT: Okay.

20 MR. RUKAVINA: Your Honor, bear with me. I'm going  
21 to get out of this chair. Mr. Dondero will get in this chair.  
22 And so that there's no reverberation, I will be sitting next  
23 to Mr. Dondero in case I have to make any objections.

24 THE COURT: Okay. All right. Good morning, Mr.  
25 Dondero.

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1 MR. DONDERO: Good morning.

2 THE COURT: Please raise your right hand.

3 JAMES DONDERO, DEBTOR'S WITNESS, SWORN

4 THE COURT: Thank you. Mr. Morris, go ahead.

5 MR. MORRIS: May I proceed, Your Honor?

6 THE COURT: Yes.

7 DIRECT EXAMINATION

8 BY MR. MORRIS:

9 Q Good morning, Mr. Dondero. Okay. John Morris; Pachulski,  
10 Stang, Ziehl & Jones; for the Debtor. Can you hear me okay,  
11 sir?

12 A Yes.

13 Q There are no board members here on behalf of any of the  
14 Funds to testify or offer any evidence; isn't that right?

15 A Not that I'm aware of.

16 Q Okay. And you knew the hearing was going to be today on  
17 the preliminary injunction, right?

18 A Yes.

19 Q And you had an opportunity to confer with the boards of  
20 the Funds in advance of this hearing, right?

21 A No.

22 Q There's no -- there's no -- no board member is expected to  
23 testify, fair?

24 A Correct.

25 Q So the Court isn't going to hear any evidence as to the

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1 board's perception of what's happening here, right?

2 A Not that I'm aware of.

3 Q Okay. Until January 9th, 2020, you controlled the debtor  
4 Highland Capital Management, LP; isn't that right?

5 A I don't remember exactly when these -- when the  
6 independent board was put in place, but up until around that  
7 time, I believe.

8 Q Okay. So, January 2020?

9 A Yes.

10 Q And during that month, you completed an agreement with the  
11 Creditors' Committee where you ceded control of the Debtor  
12 pursuant to a court order, right?

13 A Pursuant to a court ...? I thought it was pursuant to a  
14 negotiation where they would have fiduciary responsibility to  
15 the estate in my absence. That's -- that's what I think the  
16 (garbled).

17 Q Okay. You're aware -- so you entered into an agreement  
18 with the Creditors' Committee pursuant to which you ceded  
19 control of the Debtor, right?

20 MR. RUKAVINA: Your Honor, I'll object. That  
21 agreement speaks for itself. And if Mr. Morris wants to  
22 present it to Mr. Dondero, he can.

23 THE COURT: Um, --

24 MR. MORRIS: Sure. Ms. Canty, can we please put up

25 --

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1 THE COURT: All right. Well, I --

2 MR. MORRIS: I'm happy to put it up, Your Honor.

3 THE COURT: I overrule that objection. You can ask.

4 And then if he's not sure, you can present the agreement. All  
5 right? Go ahead.

6 MR. MORRIS: Okay.

7 BY MR. MORRIS:

8 Q Mr. Dondero, is there any doubt in your mind that in  
9 January of 2020 you gave up control of Highland in favor of an  
10 independent board at the Strand Advisors level?

11 A No. I -- yes, I agree with that.

12 Q Okay. And do you recall that, in connection with that  
13 agreement, the Court entered an order?

14 A Several orders. Which one?

15 Q Okay.

16 MR. MORRIS: Can we please put up Docket No. 339?

17 MS. CANTY: Sure, just one second.

18 MR. RUKAVINA: And you have it here.

19 John, I have the order if just want Mr. Dondero to review  
20 it.

21 MR. MORRIS: I think -- I think everybody should have  
22 the benefit of seeing it. But thank you very much.

23 Your Honor, while we take this moment, can you just remind  
24 me of when the Court needs to take a break today, so that I'm  
25 mindful of that and respectful of your time?



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1 THE COURT: 11:30.

2 MR. MORRIS: Okay. And what time will we reconvene?

3 THE COURT: Well, I have said 1:00. I hope it can be  
4 a little sooner, but let's just plan on 1:00, okay, so there's  
5 no confusion.

6 MR. MORRIS: Okay. All right. All right. So, on  
7 the screen here, we have Exhibit OOOO, which is in the record.  
8 BY MR. MORRIS:

9 Q This is an order that was entered by the Court on January  
10 9th, 2020. Do you see that, sir?

11 A Yes.

12 MR. MORRIS: Can we scroll down to Paragraph 9,  
13 please? (Pause.) Are you having problems, Ms. Canty?

14 MS. CANTY: It's on the screen. You can't see it?

15 MR. MORRIS: Yeah. Can you scroll down to Paragraph  
16 9?

17 MS. CANTY: It's on Paragraph --

18 MR. MORRIS: That's on Page 2, I believe.

19 MS. CANTY: Yeah, I have it up. I'm not sure what  
20 the disconnect is, because I can see it on my screen. I'm  
21 going to stop it and reshare it.

22 MR. MORRIS: Thank you very much.

23 (Pause.)

24 MS. CANTY: Do you see it now?

25 MR. MORRIS: Okay. Beautiful.

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1 BY MR. MORRIS:

2 Q Mr. Dondero, if you'd just read Paragraph 9 out loud.

3 A (reading) Mr. Dondero shall not cause any related entity  
4 to terminate any agreements with the Debtor.

5 Q Okay. So you understood, as part of the corporate  
6 governance settlement pursuant to which you avoided the  
7 imposition of a trustee, that you agreed that you wouldn't  
8 cause any related entity to terminate any agreements with the  
9 Debtor, right?

10 A Uh, --

11 Q Is that correct? You understood that paragraph?

12 A Yes.

13 Q Okay. And you didn't appeal this particular order, did  
14 you, sir?

15 A I -- I believe I've refuted -- I've adhered to that order  
16 entirely.

17 Q Okay. NexPoint Advisors LP, is one of the defendants in  
18 this matter, right?

19 A Yes.

20 (Pause.)

21 Q Can you hear me, sir?

22 A Yes. Yes, I said, "Yes."

23 MR. NICHOLSON: Well, John, did you -- did you ask a  
24 question? Because you went offline for a few seconds there.

25 MR. MORRIS: I asked whether NexPoint Advisors, LP

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1 was an advisory firm.

2 THE WITNESS: Yes.

3 BY MR. MORRIS:

4 Q And you have a direct or indirect ownership interest in  
5 NexPoint Advisors, LP, correct?

6 A Yes.

7 Q And you understand that, based on that direct or indirect  
8 ownership interest, NexPoint Advisors, LP is a related entity  
9 under Paragraph 9 of this order, right?

10 A Yes.

11 Q Okay. Highland Capital Management Fund Advisors, LP is  
12 one of the other defendants in this case, right?

13 A Yes.

14 Q And we'll refer to that entity as Fund Advisors; is that  
15 fair?

16 A Yes.

17 Q And we'll refer to Fund Advisors together with NexPoint  
18 Advisors, LP as the Advisors; is that fair?

19 A Yes.

20 Q Okay. Fund Advisors is also an advisory firm; is that  
21 (audio gap)?

22 A I missed that last question.

23 MR. RUKAVINA: John, you're freezing up on us. Is it  
24 on our end, Your Honor, or is it on Mr. Morris's end?

25 MR. MORRIS: Just let me know -- just let me know

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1 when it happens.

2 THE COURT: Yes. I'm hearing him. But go ahead, Mr.  
3 Morris. Let's try again.

4 MR. MORRIS: Okay.

5 BY MR. MORRIS:

6 Q You have a direct or indirect ownership interest in Fund  
7 Advisors, correct, sir?

8 A Yes.

9 Q (audio garbled) And based on that direct or indirect  
10 interest, you would agree that Fund Advisors is a related  
11 entity for purposes of this order, correct?

12 A Yes.

13 Q In addition to your ownership interest, you're also the  
14 president of Fund Advisors; is that (audio gap)?

15 THE COURT: All right. Now --

16 THE WITNESS: I believe so.

17 THE COURT: Yes. Now I'm starting to have some  
18 trouble, Mr. Morris. Every once in a while, you're freezing  
19 towards the end of a sentence. So I don't know what can be  
20 done, but it's --

21 MR. MORRIS: All right. Let me know if that  
22 continues.

23 THE COURT: Okay.

24 BY MR. MORRIS:

25 Q To use your words -- to use your words, Mr. Dondero, it's

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1 fair to say that you generally control Fund Advisors, right?

2 A Yes.

3 Q And based on that, you acknowledge that Fund Advisors is a  
4 related entity under the Court's order, correct?

5 A Yes.

6 Q And together, the Advisors that you own and control manage  
7 certain investment funds, correct?

8 A Yes.

9 Q And three of those funds are defendants in this case,  
10 correct?

11 A Yes.

12 Q And you are the portfolio manager of each of those funds;  
13 is that right?

14 A I believe so.

15 Q Okay. Let's talk about the events that led to this  
16 matter. CLO stands for Collateralized Loan Obligations,  
17 correct?

18 A I'm sorry. Repeat that, please?

19 Q Sure. CLO stands for Collateralized Loan Obligations,  
20 correct?

21 A Yes.

22 Q Years ago, the Advisors that you own and control caused  
23 the investment funds that they manage to buy the interests in  
24 CLOs that are managed by the Debtor, correct?

25 A Yes. Yes.

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1 Q Okay. And those Funds still hold an equity interest  
2 today, correct?

3 A Yes.

4 Q And K&L Gates is one of the law firms that represents the  
5 Advisors and the Funds that are managed by the Advisors,  
6 correct?

7 A Yes.

8 Q You would agree that the Debtor is party to certain  
9 contracts that give it the right and the responsibility to  
10 manage certain CLO assets, right?

11 A Yes.

12 Q And you recall that --

13 MR. RUKAVINA: Your Honor, Mr. Morris is frozen on  
14 our end.

15 THE COURT: Yes. Mr. Morris, you just froze.

16 MR. RUKAVINA: We heard nothing, Mr. Morris.

17 THE COURT: Yes.

18 MR. MORRIS: Okay.

19 BY MR. MORRIS:

20 Q Sir, do you recall that you resigned from the Debtor on or  
21 around October 10th, 2020?

22 A Yes.

23 Q Okay. And shortly thereafter, K&L Gates sent a couple of  
24 letters to the Debtor on behalf of the Advisors and the Funds,  
25 correct?

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1 A Yes.

2 Q Okay.

3 MR. MORRIS: Can we take a look at these? These are  
4 documents that were admitted into evidence in a different  
5 matter, but they're actually referred to in his prior  
6 testimony, which is in evidence in this case. So I would just  
7 ask Ms. Canty to go to Trial Exhibit B, which was filed in the  
8 Adversary Proceeding 20-3190 at Docket 46. And for the  
9 record, it's PDF Page #184 out of 270. I just want to take a  
10 look at these two letters.

11 BY MR. MORRIS:

12 Q Okay. Do you see this letter, sir?

13 A Yes.

14 Q And NexPoint is one of the defendants here; is that right?

15 A Yes.

16 Q And that's one of the Advisors that you own and generally  
17 control, correct?

18 A Yes.

19 Q And so this letter is sent less than a week after you've  
20 left Highland Capital Management, right?

21 A Yes.

22 Q Do you recall this particular letter?

23 A No.

24 Q Can -- you're familiar with the substance of this letter  
25 and the other one that was sent in November, correct?

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1 A Could you pull it a little higher and let me read it?

2 Q Yes. Sure.

3 MR. RUKAVINA: If this is an exhibit, I can show it  
4 to him as an exhibit, Mr. Morris.

5 MR. MORRIS: I don't know that this is one of the  
6 marked exhibits. It's one of the exhibits that's used within  
7 his prior testimony. So, but I want to give Mr. Dondero a  
8 chance to review it. And please let us know if you need to  
9 scroll further down.

10 (Pause.)

11 MR. RUKAVINA: You're going to have to scroll down.

12 THE WITNESS: Scroll down a little further, please.

13 (Pause.)

14 MR. RUKAVINA: Mr. Morris, can you please scroll  
15 down? Neither Mr. Dondero nor I can read the balance.

16 BY MR. MORRIS:

17 Q There you go. (Pause.) So, you see at the top of the  
18 page there there is a reference to the sale of assets and a,  
19 quote, "a rush to sell these assets at fire sale prices." Is  
20 that what you think -- did you think that Mr. Seery was  
21 selling (audio garbled) CLO assets at fire sale prices in  
22 October 2020, --

23 MR. RUKAVINA: Your Honor, --

24 MR. MORRIS: -- less than a week after --

25 MR. RUKAVINA: Your Honor, I'll object. We did not



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1 hear Mr. Morris's question.

2 THE COURT: All right. Could you repeat the  
3 question?

4 MR. MORRIS: Okay. Yes, Your Honor.

5 BY MR. MORRIS:

6 Q Mr. Dondero, on or about October 16th, did you personally  
7 believe that Mr. Seery was in a rush to sell CLO assets at  
8 fire sale prices?

9 A I believe he had no business purpose to sell any of the  
10 assets, which I believe he stated that to Joe Sowin, our  
11 trader. I -- I -- there was no business purpose stated or  
12 ever given or obvious from the sales. And --

13 Q Okay.

14 A -- I (indecipherable) draft this letter.

15 Q Okay.

16 MR. MORRIS: I move to strike, Your Honor. It's a  
17 very simple question --

18 THE COURT: Sustained.

19 MR. MORRIS: -- and it has to do solely with Mr.  
20 Dondero's state of mind.

21 BY MR. MORRIS:

22 Q Mr. Dondero, on or about October 16th, did you personally  
23 believe that Mr. Seery was in a rush to sell CLO assets at  
24 fire sale prices?

25 A He was in a rush to sell them for some reason with no

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1 business purpose. I don't know the reason.

2 THE COURT: All right. Can you --

3 BY MR. MORRIS:

4 Q Okay. And you never asked him, right?

5 THE COURT: Yes. Yes or no answer, Mr. Dondero.

6 THE WITNESS: Never asked him.

7 MR. MORRIS: Okay. Can we turn to the next exhibit,  
8 which is Exhibit C on that same docket?

9 (Pause.)

10 BY MR. MORRIS:

11 Q While we're waiting, can you just read the last sentence  
12 of the paragraph that ends at the top of the page, Mr.  
13 Dondero, beginning, "Accordingly"?

14 A (reading) Accordingly, we hereby request that no CLO  
15 assets be sold without prior notice and prior consent from the  
16 Advisors.

17 Q Are you aware of any contractual provision pursuant to  
18 which the Funds or the Advisors can -- can expect that the  
19 Debtor will refrain from any -- selling any assets without  
20 giving prior notice and obtaining prior consent from those  
21 entities?

22 A I think the documents have an overall good-faith/fair-  
23 dealing clause which would cover something like this, I  
24 believe.

25 Q Your -- is it your testimony, sir, that the duty of good

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1 faith and fair dealing requires the Debtor to give notice to  
2 the Advisors and to obtain the Advisors' prior consent before  
3 they can sell any CLO assets?

4 A Well, I think -- yes, I do. I think --

5 Q All right.

6 A Yes. Yeah.

7 Q Okay. And then the next month, another letter was sent by  
8 NexPoint to Mr. Seery. Do you recall that?

9 A Not specifically. If you bring it up, we can talk about  
10 it.

11 MR. MORRIS: Can we scroll down a little bit?

12 (Pause.)

13 MS. CANTY: John, are you talking to me? I was  
14 frozen out. I just got back on. I apologize.

15 MR. MORRIS: That's okay. Can we just scroll down so  
16 Mr. Dondero can see more of this particular letter?

17 MS. CANTY: Okay.

18 MR. MORRIS: Okay.

19 BY MR. MORRIS:

20 Q Can you just read out loud, Mr. Dondero, out loud the last  
21 two sentences, please, beginning with, "We understand"?

22 A (reading) We understand that Charitable DAF Holdco, Ltd.  
23 has made a similar request. Accordingly, we hereby re-urge  
24 our request that no CLO assets be sold without prior notice to  
25 and prior consent from the Advisors.

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1 Q What's the Charitable DAF Holdco, Ltd.?

2 A I think that's who you settled with yesterday.

3 Q Do you have an interest in that entity?

4 A No. It's a bona fide charity. It was one of the largest  
5 in Dallas before it got cut in half by Acis.

6 Q Does -- are you familiar with the Get Good and the Dugaboy  
7 Investment Trusts?

8 MR. RUKAVINA: Your Honor, at this time I would  
9 object to relevance. I don't see what this has to do with  
10 tortious interference and stay violation on December 22nd and  
11 December 23rd, 2020.

12 THE COURT: Response?

13 MR. MORRIS: Your Honor, I'm trying to establish that  
14 Charitable DAF Holdco, Ltd. is another entity in which Mr.  
15 Dondero holds a beneficial interest.

16 THE COURT: Okay. Overrule the objection.

17 MR. RUKAVINA: John, you're not only frozen, now  
18 you're off.

19 MR. MORRIS: Yeah, I can see myself. You can't hear  
20 me?

21 MR. RUKAVINA: We can now, but Your Honor, we lost  
22 Mr. Morris for a bit there.

23 THE COURT: All right. I think we were --

24 MR. MORRIS: Okay.

25 THE COURT: -- waiting on an answer from Mr. Dondero,

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1 actually.

2 THE WITNESS: We didn't hear the question at --

3 BY MR. MORRIS:

4 Q Sure. Are you familiar with the Get Good and Dugaboy  
5 Investment Trusts?

6 A Yes.

7 Q Are you the beneficiary of those trusts?

8 MR. RUKAVINA: Your Honor, again, objection to  
9 relevance. These are non-parties, and what his personal  
10 interests are has no relevance to this.

11 THE COURT: Overruled.

12 THE WITNESS: The Get Good Trust, Get -- I believe  
13 those are defective grantor trusts. I don't believe I have  
14 any interest whatsoever in those. Dugaboy is a perpetual  
15 Delaware trust. I don't know how that's set up, but I believe  
16 I do have an interest there until I pass.

17 BY MR. MORRIS:

18 Q In fact, you're -- you're the sole beneficiary of the  
19 Dugaboy Investment Trust, right?

20 A Until I pass. It's a -- it's a estate planning trust.

21 Q I appreciate that. And the Dugaboy and the Get Good  
22 Trusts are the owners of the Charitable DAF Holdco Ltd.,  
23 correct?

24 A No. Not as far as I know.

25 Q Okay.

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1 A (garbled) time at all.

2 Q All right. So we just looked at these two letters, sir.

3 And you were familiar with the substance of the letters before  
4 they were sent, right?

5 A Uh, just --

6 MR. MORRIS: You can take it down, Ms. Canty.

7 THE WITNESS: Just generally. Again, I wasn't  
8 involved directly with the letters.

9 BY MR. MORRIS:

10 Q You were aware of the letters before they were sent,  
11 right?

12 A Yes.

13 Q And you discussed the substance of the letters with  
14 NexPoint, correct?

15 A Not the substance of the letters, just the substance of  
16 the issue.

17 Q You actually discussed the substance of the letters with  
18 NexPoint, correct?

19 A I -- Again, I remember it being the substance of the  
20 issue. Generally, at most, the substance of the letters.

21 Q And you discussed the substance of the letters with the  
22 Advisors' internal counsel, too, right?

23 A The sub -- generally, the substance, yes, but more the  
24 issue than the letter.

25 Q Okay. If I pull up your transcript from the TRO hearing,

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1 would that refresh your recollection that you discussed the  
2 substance of these letters with NexPoint and with the  
3 Advisors' internal counsel?

4 A I'd like to clarify with the testimony I just gave.

5 Q Okay. Would you -- do you have any reason to believe that  
6 you did not previously testify that you discussed the  
7 substance of the letters with NexPoint and with NexPoint  
8 Advisors' internal counsel?

9 A I repeat the same testimony. Generally. Like, those  
10 letters that you put on the screen, I have no recollection of  
11 those specifically.

12 MR. MORRIS: Ms. Canty, can we please call up on the  
13 screen Exhibit NNNN, which was the transcript from the January  
14 8th, 2021 preliminary injunction hearing?

15 MR. RUKAVINA: Mr. Morris, just one sec. I'm trying  
16 to find it on paper.

17 MR. MORRIS: Yeah. It's four Ns.

18 MR. RUKAVINA: One, two, three, four. (inaudible)  
19 put that on the screen.

20 MS. CANTY: John, I'm not sure what's going on, but  
21 it won't come up on the screen. I've tried three times. I'm  
22 going to keep trying.

23 MR. MORRIS: All right. I have it in front of me.  
24 Do you have it, too?

25 MR. RUKAVINA: Yes, the witness has it --

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1 MR. MORRIS: Okay.

2 MR. RUKAVINA: -- in front of him. This is NNNN,  
3 just to confirm?

4 MR. MORRIS: Yes. And it is the January 8th  
5 transcript.

6 BY MR. MORRIS:

7 Q Mr. Dondero, were you asked these questions and did you  
8 give these answers? Question: Are you familiar with --

9 MR. RUKAVINA: Where are you, John? Where are you?  
10 Where are you? We -- we -- we --

11 MR. MORRIS: I apologize. Page 40. I'm going to  
12 read Page 40, Lines 1 through 14.

13 MR. RUKAVINA: Okay. He has it in front of him, if  
14 you just want him to read it.

15 BY MR. MORRIS:

16 Q Did you give these answers at Page 40, beginning Line 1:

17 "Q And were you -- and you were familiar, you were  
18 aware of these letters before they were sent; is that  
19 correct?

20 "A Yes.

21 "Q And you generally discussed the substance of these  
22 letters with NexPoint; is that right?

23 "A Generally, yes.

24 "Q You discussed the letters with the internal  
25 counsel; is that right?



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1 "A Yes.

2 "Q That's D.C. Sauter?

3 "A Yes.

4 "Q And you have been on some calls with K&L Gates  
5 about these letters, right?

6 "A I believe so.

7 "Q And you knew these letters were being sent,  
8 correct?

9 "A Yeah. They're -- they're reported.

10 Q Did you give those answers to those questions at the prior  
11 hearing?

12 A I -- I believe it's what I -- it's almost exactly what I  
13 just said, but yes.

14 Q And you supported the sending of the letters; isn't that  
15 right?

16 A Absolutely.

17 Q And you encouraged the sending of the letters, right?

18 A Absolutely.

19 Q Around Thanksgiving, you learned that Mr. Seery had given  
20 a direction to sell certain securities owned by CLOs managed  
21 by the Debtor, correct?

22 A Yes.

23 Q And when you learned that, you personally intervened to  
24 stop the trades, correct?

25 A Yes.

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1 Q Let's -- I want to look at that email string that we  
2 looked at once before. It can be found at Trial Exhibit D  
3 found on Docket No. 46 in the adversary proceeding. It's PDF  
4 Number -- it's PDF Page 189 of two (garbled).

5 MR. RUKAVINA: Did you catch that?

6 THE COURT: Which -- which exhibit number -- letter  
7 is it?

8 MR. MORRIS: It's on the docket in the Adversary  
9 Proceeding 20-3190. And in that adversary proceeding, at  
10 Docket No. 46, you've got the Debtor's exhibit list. And  
11 Exhibit D, which can be found at PDF Page 189 of 270, is the  
12 email string I'm looking for.

13 I apologize, Your Honor. It wasn't until I was reading  
14 the transcript yesterday that I realized I needed these  
15 documents. But they are in the record. Obviously, they're  
16 referred to in the transcript that is in the record.

17 THE COURT: Okay.

18 MR. RUKAVINA: Your Honor, I would like to interject  
19 for the record here that this is the first time my clients  
20 have been sued. They have a right to be confronted with the  
21 witnesses and testimony and evidence against them. So if Mr.  
22 Morris wants to introduce this as an exhibit here today,  
23 that's one thing, but I object to any notion that there's a  
24 prior record that is going to tie my clients' hands. It might  
25 tie Mr. Dondero's hands, but not my clients' hands.

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1 MR. MORRIS: I'd move for the introduction into  
2 evidence of this document that has emails not only from Mr.  
3 Dondero, but from Joe Sowin, the head trader of the  
4 Defendants.

5 MR. RUKAVINA: And Your Honor, I have no problem with  
6 that admission. I just want to make it clear that we're not  
7 conceding that whatever happened in this case previous to this  
8 is a part of today's record. That's all. So I do not have a  
9 problem with the admission of this. I would, however, ask  
10 you, Mr. Morris, to have someone email it to us so that I can  
11 use it today if I need to.

12 THE COURT: All right.

13 MR. MORRIS: Okay. Will do.

14 THE COURT: So, I'll --

15 MR. MORRIS: We'll do that at the --

16 THE COURT: I'll admit it into evidence. You'll need  
17 to not only email it Mr. Rukavina, but you'll need to file a  
18 supplement to your exhibit and witness list after the hearing  
19 showing the admission of --

20 MR. RUKAVINA: And Mr. Morris, if you could email it  
21 to Mr. -- if you could email it to Mr. Vasek as well, because  
22 obviously I can't get to it now. Thank you.

23 MR. MORRIS: Sure.

24 THE COURT: All right. So this --

25 MR. MORRIS: Okay. So, --

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1 THE COURT: For the record, let's just be clear what  
2 the record is -- this is going to be called on the record. I  
3 think you are up to SSSSS, so this would be TTTT when you  
4 file it on the record. All right? Go ahead.

5 MR. MORRIS: Thank you very much, Your Honor.

6 (Debtor's Exhibit TTTT is received into evidence.)

7 BY MR. MORRIS:

8 Q Mr. Dondero, you recall looking at this email string at  
9 the last hearing, right?

10 A Yes.

11 Q Let's start at the bottom, please, with Mr. Covitz's  
12 email.

13 (Pause.)

14 MR. RUKAVINA: Hey, John, real quick, now we've lost  
15 you. We've lost you and we're not seeing anything from your  
16 assistant. Do you have the email, Mr. Vasek?

17 MR. MORRIS: I'm here. Can you hear me?

18 MS. CANTY: I'm here. (garbled) on the screen.

19 MR. MORRIS: Yeah. Can we scroll down to the bottom?

20 MS. CANTY: I did. I don't know why it's not showing  
21 on you guys' screen.

22 MR. MORRIS: Hopefully this gets fixed. Yeah. We've  
23 never had this problem before, Your Honor. I'm not sure what  
24 the issue is, but I do apologize.

25 THE COURT: All right. Well, I can hear you, but we

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1 don't see movement of the exhibit.

2 MR. MORRIS: Yeah. When I began earlier today by  
3 suggesting that this was going to be challenging, this was not  
4 one of the challenges I anticipated.

5 THE COURT: Okay. All right.

6 MR. RUKAVINA: Do you have the email yet?

7 MS. CANTY: I'm sorry. I don't know what's happening  
8 on this end. I have three streams of Internet going, and I  
9 don't think it's the Internet. I don't know what's going on.

10 MR. MORRIS: Hmm.

11 MR. RUKAVINA: Yeah, John, what I'm suggesting is  
12 that you have an associate email it to Mr. Vasek immediately  
13 and then we can present it to Mr. Dondero.

14 MR. MORRIS: I'll tell you what. While that -- one  
15 more try.

16 MR. CANTY: Can you see it now?

17 MR. MORRIS: Okay. Yes.

18 BY MR. MORRIS:

19 Q All right. Mr. Dondero, Hunter Covitz is an employee of  
20 the Debtor, right?

21 MR. RUKAVINA: Hold on a sec. Hold on a sec.

22 Your Honor, I believe that I have the right to see the  
23 full email here. I believe that Mr. Dondero does. And we've  
24 just seen the first little bit and now some middle piece.

25 THE COURT: All right. So are you saying --

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1 MR. MORRIS: And in the order that --

2 THE COURT: -- you want to see the whole string?

3 MR. RUKAVINA: Well, I think -- Mr. Dondero, do you  
4 need to see the whole string? I don't know what this is, but  
5 maybe you do.

6 MR. DONDERO: It depends on what the question is. I  
7 can answer some questions off of this email.

8 THE COURT: Okay, let's go.

9 MR. MORRIS: Yeah.

10 BY MR. MORRIS:

11 Q All right. So, for the moment, Mr. Covitz is an employee  
12 of the Debtor, correct?

13 A Yes.

14 Q And he's the author of this email in front of us, correct?

15 A Yes.

16 Q And Mr. Covitz helps to manage the CLO assets on behalf of  
17 the Debtor, correct?

18 A Yes.

19 Q Mr. Covitz is giving directions to Matt Pearson and Joe  
20 Sowin to sell certain securities held by the CLOs, correct?

21 A Yes.

22 Q And if we can scroll up, I think we can see that you  
23 received a copy of this email?

24 (Pause, 11:15 a.m.)

25 MR. MORRIS: What I would like to do instead, we'll

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1 take a break in about 15 or 20 (audio gap). When we  
2 disconnect, we'll get a better connection after the break.  
3 And in the interim, I've got testimony that I would like  
4 that's already been admitted into the record but there's  
5 portions of which I would like to read into the record from  
6 Dustin Norris, who is the executive vice president for each of  
7 the Defendants. And maybe it would be easiest for me to do  
8 that.

9 THE COURT: Okay.

10 MR. MORRIS: All right. On Docket No. 39.

11 MR. RUKAVINA: Your Honor, I apologize. Your Honor,  
12 I apologize. We did not hear --

13 MR. MORRIS: I'm going to read into the record a  
14 portion of Mr. Norris' testimony from the December 16th  
15 hearing.

16 MR. RUKAVINA: Your Honor, I do not see that  
17 transcript in the exhibits. If Mr. Morris could give me an  
18 exhibit.

19 MR. MORRIS: Exhibit B as in boy.

20 MR. RUKAVINA: Thank you.

21 MR. MORRIS: All right. Instead of putting it on the  
22 screen, if we could take the exhibit down, Ms. Canty. He can  
23 just follow along. Beginning at Page 38, Line 7 through -- 7  
24 through 17.

25 Are you there, Mr. Rukavina?

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1 MR. RUKAVINA: I am. Thank you. I have it in front  
2 of Mr. Dondero.

3 MR. MORRIS: Okay. Page 38, Lines 7 through 17:

4 "Q I think you testified that you're one of the  
5 executive vice presidents at NexPoint Advisors, one of  
6 the Movants. Is that right?

7 "A That's right.

8 "Q Who is the president of NexPoint Advisors, LP?

9 "A Mr. Dondero.

10 "Q And you report directly to him; is that right?

11 "A I do.

12 "Q You're also the executive vice president of Fund  
13 Advisors, another Movant; is that right?

14 "A Correct."

15 MR. MORRIS: Beginning on Page 38, Line 25:

16 "Q You're also the executive vice president (audio  
17 gap) that are managed by the Advisors here, right?

18 "A Yes. That is correct."

19 MR. MORRIS: Then going back to Page 35, beginning at  
20 Line 15:

21 "Q To be clear here, there are five moving parties;  
22 is that right?

23 "A That's correct. The two Advisors and the three  
24 Funds.

25 "Q And one of the advisory firms is Highland Capital



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1 Management Fund Advisors, LP; is that right?

2 "A That's correct.

3 "Q And I'll refer to that as Fund Advisors; is that  
4 okay?

5 "A That's great.

6 "Q James Dondero and Mark Okada are the beneficial  
7 owners of Fund Advisors, correct?

8 "A That is my understanding.

9 "Q And your understanding is that Mr. Dondero  
10 controls Fund Advisors, correct?

11 "A That's correct.

12 "Q And the other advisory firm that brought the  
13 motion is NexPoint Advisors, LP; is that right?

14 "A That is correct.

15 "Q And Mr. Dondero is the beneficial owner of  
16 NexPoint; is that right?

17 "A A family trust where Jim is the sole beneficiary,  
18 I believe, controls or owns NexPoint Advisors.

19 "Q Okay. And Mr. Dondero --

20 "A Or 99 percent of NexPoint Advisors.

21 "Q Mr. Dondero controls NexPoint; is that right?

22 "A Correct."

23 MR. MORRIS: Continuing at Line 16 on Page 36:

24 "Q All right. And I'm going to refer to Fund  
25 Advisors and NexPoint as the Advisors going forward; is

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1 that fair?

2 "A That's fair.

3 "Q Each of the Advisors manages certain funds; is  
4 that right?

5 "A That is correct.

6 "Q And three of those funds that are managed by the  
7 Advisors are Movants on this motion, correct?

8 "A Correct.

9 "Q All right. The Advisors caused these three Funds  
10 to invest in CLOs that are managed by the Debtor; is  
11 that right?"

12 "A --"

13 MR. RUKAVINA: Your Honor, I object. Is there a  
14 question at the end of this? I mean, Mr. Dondero can't  
15 possibly remember all this and then be asked a question.

16 MR. MORRIS: He doesn't have to answer any questions.  
17 I'm just reading the evidence into the record.

18 THE COURT: Okay.

19 MR. RUKAVINA: Your Honor?

20 MR. MORRIS: Since we're having difficulty --

21 MR. RUKAVINA: Your Honor, that's a matter for  
22 summation. That's -- this is a question and answer, I submit.

23 THE COURT: Well, I overrule.

24 MR. MORRIS: Your Honor, here's -- here's --

25 THE COURT: This has been admitted into --

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1 MR. MORRIS: Yeah.

2 THE COURT: -- evidence. And if he wants to  
3 highlight to the Court portions of the evidence, he can.

4 Go ahead.

5 MR. MORRIS: Thank you, Your Honor.

6 "A The portfolio managers working for the Advisors  
7 did. That's correct.

8 "Q And Mr. Dondero is the portfolio manager of the  
9 Highland Income Fund; is that right?

10 "A He is one of the portfolio managers for that Fund.

11 "Q And he's also --

12 "A I believe there are two.

13 "Q And he's also a portfolio manager of NexPoint  
14 Capital, Inc., one of the Movants here, right?

15 "A That is correct.

16 "Q And he's also the portfolio manager of NexPoint  
17 Strategic Opportunities Fund, another Movant; is that  
18 right?

19 "A Yes. That is correct."

20 MR. MORRIS: Going to Line -- Page 41, Lines 6  
21 through 9:

22 "Q The whole idea for this motion initiated with Mr.  
23 Dondero; isn't that right?

24 "A The concern, yes, the concern originated, and his  
25 concern was voiced to our legal and compliance team."

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1 MR. MORRIS: Page 42, Lines 4 through 11:

2 "Q None of the Movants are parties to the agreements  
3 between the Debtor and each of the Debtors pursuant --  
4 each of the CLOs pursuant to which the Debtor serves as  
5 portfolio manager; is that correct?

6 "A I believe that is correct. One, I think,  
7 important -- even though they're not (audio gap), they  
8 are the -- they have the economic ownership of each of  
9 these CLOs.

10 "Q But they're not party to the agreement; is that  
11 right?

12 "A Not that I am aware of."

13 MR. MORRIS: Page 42, Line 25:

14 "Q Okay. It's your understanding, in fact, that  
15 nobody other than the Debtor has the right or the  
16 authority to buy and sell assets on behalf of the CLOs  
17 listed on Exhibit B, correct?

18 "A That is my understanding.

19 "Q Okay. And it's also your understanding, your  
20 specific understanding, that holders of preferred  
21 shares do not make investment decisions on behalf of  
22 the CLO; is that right?

23 "A (audio gap)

24 "Q And that's something the Advisors knew when they  
25 decided to invest in the CLOs on behalf of the Movant

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1 Funds; is that fair?

2 "A That's right. And at that time, the knowledge in  
3 the purchase was with Highland Capital Management, LP  
4 and the portfolio management team at the time.

5 "Q And it's still with Highland Capital Management,  
6 LP; isn't that right?

7 "A That's correct. I'm not sure that the portfolio  
8 management team looks the same, but it was HCMLP."

9 MR. MORRIS: Moving on to Page 46, Line 22:

10 "Q The only holders of preferred shares that are  
11 pursuing this motion are the three Funds managed by the  
12 Advisors, right?

13 "A In this motion, yes.

14 "Q You're not aware of any holder of preferred shares  
15 pursuing this motion other than the three Funds managed  
16 by the Advisors, correct?

17 "A No, I'm not aware of any others.

18 "Q You didn't personally inform any holder of  
19 preferred shares, other than the Funds that are the  
20 Movants, that this motion would be filed, did you?

21 "A No, I did not.

22 "Q You're not aware of any steps taken by either of  
23 the Advisors to provide notice to holders of preferred  
24 shares that this motion was going to be filed, are you?

25 "A I'm not, no.

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1 "Q And you're not aware of any attempt that was made  
2 to obtain the consent of all of the noteholder -- of  
3 all the holders of the preferred shares to seek the  
4 relief that is sought in this motion, correct?

5 "A That's correct.

6 "Q You don't have any personal knowledge, personal  
7 knowledge, as to whether any holder of preferred shares  
8 other than the Funds managed by the Advisors wants the  
9 relief sought in this motion, correct?

10 "A Correct.

11 "Q You don't have any personal knowledge as to  
12 whether any of the CLOs that are subject to the  
13 contracts that you described want the relief that's  
14 being requested in this motion, right?

15 "A That's correct. I have not spoken or been  
16 involved at all directly with the CLOs. I'm  
17 representing the Funds."

18 MR. MORRIS: Moving to Page 49. I just have a bit  
19 more, Your Honor. Page 49, Line 9. And this is the reference  
20 to his declaration.

21 "Q And Paragraph 9 refers to a transaction involving  
22 SSP Holdings, LLC; do I have that right?

23 "A That's correct.

24 "Q Do you know what SSP stands for?

25 "A See if we say it in there. SSP Holdings, LLC.

Dondero - Direct

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1 "Q Right. Do you know what SSP stands for?

2 "A I don't. Something Steel Products. I --

3 "Q Okay. You don't need to guess. These are the  
4 only two transactions that the Movants question; is  
5 that right?

6 "A These transactions, as well as certain  
7 transactions around Thanksgiving time.

8 "Q Okay. We'll talk about those. But those  
9 transactions about -- around Thanksgiving time aren't  
10 in your (audio gap)?

11 "A Not specifically mentioned by name.

12 "Q Okay. Let's talk about the two that are mentioned  
13 by name, Trussway and SSP. The Movants do not contend  
14 that either transaction was the product of fraudulent  
15 conduct, do they?

16 "A No.

17 "Q The Movants do not contend that the Debtor  
18 breached any agreement by effectuating these  
19 transactions, do they?

20 "A I don't believe so.

21 "Q In fact, the Movants do not contend that the  
22 Debtor violated any agreement at any time in the  
23 management of the CLOs listed on Exhibit B; is that  
24 right?

25 "A That's right.

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1 "Q The Movants don't even question the Debtor's  
2 business judgment, only the results of the trans -- of  
3 these two transactions. Is that right?

4 "A That's right. And the results is the key here,  
5 and the approach."

6 MR. MORRIS: Moving on to Page 51, Line 8:

7 "Q Sir, you never asked the Debtor what factors it  
8 considered in making these trades, right?

9 "A I did not.

10 "Q And you have no reason to believe that anyone on  
11 behalf of the Movants ever asked the Debtor why it  
12 executed these (audio gap), right?

13 "A I don't have any knowledge. There could have been  
14 somebody from (audio gap) Movants. But I do not."

15 MR. MORRIS: Page 54, Line 19:

16 "Q Let's just talk briefly about the transactions  
17 that occurred (garbled) Thanksgiving. They're not  
18 specifically referred to in your declaration; is that  
19 right?

20 "A That's correct.

21 "Q And you have no knowledge about any transaction  
22 that Mr. Seery wanted to execute around Thanksgiving;  
23 is that right?

24 "A I know there were transactions and there were  
25 concerns from our management team, but I'm not aware of



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1 what those transactions were.

2 "Q In fact, you can't even identify the assets that  
3 Mr. Seery wanted to sell around Thanksgiving, or at  
4 least you couldn't at the time of your deposition  
5 yesterday. Is that right?

6 "A That's correct.

7 "Q And you have no knowledge as to why Mr. Seery  
8 wanted to make particular trades around Thanksgiving?

9 "A No, I don't.

10 "Q And in fact, you don't even know if the  
11 transactions that Mr. Seery wanted to close around  
12 Thanksgiving ever in fact closed. Is that fair?

13 "A Correct."

14 MR. MORRIS: Last one. Page 56, Line 1:

15 "Q Okay. To the best of your knowledge, does this  
16 document accurately reflect the composition of the  
17 boards of each of the three Movant Funds?

18 "A Yes, it does.

19 "Q Okay. John Honis, I think you mentioned him  
20 earlier. He's on all three boards. Is that right?

21 "A Yeah, that's correct. And the reason we're --  
22 we're being -- we have a unitary board structure, so --  
23 which is very common in '40 Act Fund land, where the  
24 board sits, for efficiency purposes, on multiple fund  
25 boards, and there's a lot of economies of scale from an

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1 operating standpoint. So, yes, they sit on multiple  
2 boards.

3 "Q Okay. And for purposes of the '40 Act, Mr. Honis  
4 has been deemed to be an interested trustee. Is that  
5 right?

6 "A That's correct.

7 "Q Okay. But you don't specifically know what (audio  
8 gap) caused that designation; you only know that the  
9 designation exists. Right?

10 "A That's right. And I know they are disclosed in  
11 the proxy -- or, in the -- the relative filings related  
12 to those Funds.

13 "Q Okay. Three other people are common to all three  
14 Movant Funds. I think you've got Dr. Froehlich, Ethan  
15 Powell, --

16 MR. MORRIS: I think he -- pronunciation.

17 "A Froehlich.

18 "Q Ethan Powell and Bryan Ward. Right?

19 "A That is correct.

20 "Q Okay. All three of those individuals actually  
21 serve on the 11 or 12 boards that you mentioned earlier  
22 that are managed by the Advisors, right?

23 "A That is correct.

24 "Q And they're the same Funds for which you serve as  
25 the executive vice president, right?

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1 "A This is correct -- yes. That's correct.

2 "Q So, for all of the Funds that are managed by the  
3 Advisors, you serve as executive vice president and all  
4 four of these directors -- trustees serve as trustees  
5 on the boards, right?

6 "A Yes, that's correct.

7 "Q Okay. In exchange for serving on all of these  
8 boards, the three individuals -- Dr. Froehlich, Mr.  
9 Ward, and Mr. Powell -- each receive \$150,000 a year  
10 for services across the Highland complex; is that  
11 right?

12 "A That's correct.

13 "Q Dr. Froehlich has been serving as a board member  
14 across the Highland complex for seven or eight years  
15 now; is that right?

16 "A That's correct.

17 "Q Mr. --

18 "A I believe it's about seven or eight years.

19 "Q Mr. Powell, he actually was employed by Highland  
20 related -- Highland or related entities from about 2007  
21 or 2008 until 2015, right?

22 "A That's correct.

23 "Q And Mr. Ward, the third of the independent  
24 trustees, he's been serving on a board or various of --  
25 on various Highland-related funds on a continuous basis

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1 since about 2004. Do I have that right?

2 "A Yeah, I believe that's correct."

3 MR. MORRIS: Your Honor, that concludes the reading  
4 of the portions of Mr. Norris's testimony that I wanted to  
5 present to the Court.

6 I know it's 11:30 now, and I would respectfully request  
7 that we simply adjourn and let Your Honor tend to your  
8 business.

9 THE COURT: Okay.

10 MR. MORRIS: And hopefully when we come back at 1:00  
11 o'clock, we'll have a better connection.

12 THE COURT: All right. So, we are going to go into  
13 recess until 1:00 o'clock Central. Mike, can people just stay  
14 connected, or should they --

15 THE CLERK: Yes. They can stay. Yes.

16 THE COURT: You can stay or reconnect, whichever you  
17 want. But we'll see you at 1:00.

18 MR. MORRIS: Thank you, Your Honor.

19 THE CLERK: All rise.

20 (A luncheon recess ensued from 11:33 a.m. until 1:37 p.m.)

21 THE CLERK: All rise. The United States Bankruptcy  
22 Court for the Northern District of Texas, Dallas Division, is  
23 now in session, the Honorable Stacey Jernigan presiding.

24 THE COURT: Good afternoon. Please be seated.  
25 Apologies. I was a little ambitious in my time estimate. So,

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1 anyway, I didn't have any control over getting in and out of  
2 Parkland Hospital, so I'm just grateful to be here.

3 All right. We were in the middle of direct examination of  
4 Mr. Dondero. Mr. Morris, are you ready to proceed?

5 MR. MORRIS: I am, Your Honor, and I'm hopeful that  
6 the computer issues have resolved themselves. It remains to  
7 be seen once we try. If problems arise again, I plan on just  
8 putting this on mute and dialing in through the telephone,  
9 kind of the other alternative.

10 THE COURT: All right.

11 MR. MORRIS: So (garbled) and I apologize to Mr.  
12 Dondero, too. I know I'm testing his patience. But it's not  
13 for any reason other than technological.

14 THE COURT: All right.

15 MR. MORRIS: And Your Honor, you don't have to  
16 apologize for keeping us waiting. That's okay.

17 THE COURT: Okay.

18 MR. MORRIS: But thank you.

19 THE COURT: All right. Mr. Dondero, --

20 MR. MORRIS: All right. So, --

21 THE WITNESS: Yeah.

22 THE COURT: I was just going to remind you, I have to  
23 remind you you're still under oath.

24 Are you ready, Mr. Morris?

25 MR. MORRIS: I am, Your Honor.

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1 THE COURT: All right. You may proceed.

2 MR. MORRIS: And we're going to begin with the  
3 document that we had difficulty scrolling through earlier,  
4 which we have now sent to counsel, and that would be what was  
5 marked as Exhibit D on Docket No. 46.

6 THE COURT: All right.

7 MR. MORRIS: That's the email string that we had seen  
8 earlier that I think Your Honor admitted into evidence. Do I  
9 have that right?

10 THE COURT: Yes.

11 MR. MORRIS: Okay.

12 DIRECT EXAMINATION, RESUMED

13 BY MR. MORRIS:

14 Q So, let's just start at the bottom and see if we can do  
15 this more easily, Mr. Dondero. And again, I apologize for  
16 keeping you waiting before. Starting at the bottom, that's an  
17 email from Hunter Covitz. Do you see that?

18 A Yeah, I see it.

19 Q And he's an employee of the Debtor, right?

20 A Yes.

21 Q And your understanding is that Mr. Covitz actually helps  
22 the Debtor manage the CLO assets, right?

23 A Yes.

24 Q And in this email, Mr. Covitz is giving directions to Matt  
25 Pearson and Joe Sowin regarding certain securities held by the

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1 CLOs, right?

2 A Yes.

3 Q And if we could scroll up, hopefully, we can see that you  
4 received a copy of this email.

5 MR. MORRIS: Yeah. Right there.

6 BY MR. MORRIS:

7 Q Do you see that?

8 A Yes.

9 Q And then -- and then you instructed the recipients of Mr.  
10 Covitz's email not to sell the SKY securities as had been  
11 instructed by Mr. Seery, correct?

12 A Yes.

13 Q And you understood when you gave that instruction that the  
14 people on the email were trying to execute trades that Mr.  
15 Seery had authorized, correct?

16 A Incorrect.

17 Q You didn't know that, sir?

18 A What I knew was that Seery had not authorized the trade,  
19 he had orchestrated the trade. Hunter is not an analyst with  
20 any particular knowledge. I called Hunter, why would he sell  
21 those? And he said Seery told him to sell those. So it  
22 wasn't that Seery authorized Hunter trading it. It was Seery  
23 told Hunter to trade it, which is -- which is a material  
24 difference in my mind.

25 Q Okay. So I'll ask you again. At the time you gave the

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1 instruction, "No, do not," you knew that you were stopping  
2 trades that had been authorized and directed by Mr. Seery,  
3 correct?

4 A Yes.

5 Q You didn't speak with Mr. Seery before sending this email,  
6 did you?

7 A No.

8 Q And you took no steps to seek the Debtor's consent before  
9 instructing the recipients of this email to stop executing the  
10 SKY transactions. Is that right?

11 A I'm sorry. I missed the first part of that question.

12 Q Okay. You took no steps to seek the Debtor's consent  
13 before instructing the recipients of this email to stop  
14 executing the SKY transactions that were authorized by Mr.  
15 Seery, correct?

16 A I don't -- I'm not sure I was permitted to talk to Seery  
17 at this point, but I don't recall specifically, no.

18 Q You didn't seek consent, did you, before stopping these  
19 trades?

20 A No.

21 Q Okay. In response to your instruction --

22 MR. MORRIS: If we could scroll up to the next  
23 response.

24 BY MR. MORRIS:

25 Q You see the response from Mr. Pearson?



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1 A Yes.

2 Q And in response to your instructions, Mr. Pearson canceled  
3 all of the SKY and AVYA sales that the Debtor had directed but  
4 which had not yet been executed, right?

5 A Yes.

6 Q Okay.

7 MR. MORRIS: Can we scroll up to the next email,  
8 please?

9 BY MR. MORRIS:

10 Q And you responded again, right? That's your response?

11 A Yes.

12 Q Can you read your response out loud, please?

13 A (reading) HFAM and DAF have instructed Highland in writing  
14 not to sell any CLO underlying assets. There is potential  
15 liability. Don't do it again, please.

16 Q And the writings that you refer to there are the two  
17 letters that we looked at earlier, the October 16 and the  
18 November 24 letter, right?

19 A I believe so. If not, if there's a third or fourth  
20 letter, all the letters in aggregate.

21 Q All right. And you, you interpreted those letters not as  
22 requests but, as you tell the recipients of your email here,  
23 that they were actually instructions, right?

24 A That was -- that was my choice of words. I don't know if  
25 I thought about it that clearly.

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1 Q Okay. But the reci... you have no reason to believe that  
2 the recipient of this email wouldn't understand that you  
3 believed that Highland had been instructed not to do these  
4 trades, right?

5 A I'm sorry. Can you ask that again? I had no reason to  
6 believe what?

7 Q That's okay. I'll move on. At this juncture, the  
8 reference to potential liability was intended for Mr. Pearson,  
9 right?

10 A Frankly, when you violate the Advisers Act, the CFO has  
11 liability. I mean, I'm sorry, the chief compliance officer  
12 has liability, and anybody who has an awareness that it  
13 violates the Advisers Act has potential liability also.

14 Q And is it -- is it your testimony and your position that  
15 Mr. Pearson had potential liability under the Advisers Act for  
16 carrying out Mr. Seery's trade requests?

17 A Yes, once he was informed that the underlying investors  
18 didn't want assets sold and Seery had stated he had no  
19 business purpose in selling those assets.

20 MR. MORRIS: I move to strike the latter part of the  
21 answer, Your Honor. Mr. Dondero has testified repeatedly  
22 multiple times that he has never communicated with Mr. Seery  
23 about why he wanted to make these transactions.

24 THE COURT: I grant that.

25 BY MR. MORRIS:

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1 Q Mr. Sowin responded and indicated that he would follow  
2 your instructions, right, if we scroll to the next email?

3 A I'm sorry. What part are you saying, or what part are you  
4 referring to?

5 Q Mr. Sowin. Who is Mr. Sowin?

6 A He's Matt Pearson's boss. He's the head trader.

7 Q And he works for the Advisors, right?

8 A Yes.

9 Q He's one of your employees, right?

10 A Yes.

11 Q Mr. Sowin followed your instructions as set forth in this  
12 email, right?

13 A He did a bunch of things, but, yes, I believe -- yes,  
14 that's a fair way to characterize.

15 Q And the only information that you know of that he's  
16 relying upon to state that Compliance should never have  
17 approved this order was your email that preceded it, right?

18 A No.

19 Q No? There's nothing else on this email other than your  
20 email that preceded it, correct?

21 A Correct.

22 Q Okay. A few days later, you learned that Mr. Seery was  
23 trying a workaround to effectuate the trades anyway, right?

24 A I believe so.

25 MR. MORRIS: Can we scroll up to the next email?

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1 BY MR. MORRIS:

2 Q This is your response to Mr. Surgent, right?

3 A Yes.

4 Q Now, Mr. Surgent hasn't written anything. He is not part  
5 of this conversation, is he?

6 A No.

7 Q But you bring him into the conversation, right?

8 A Because he's the chief compliance officer at Highland,  
9 yes.

10 Q He's not -- he's not the chief compliance officer for the  
11 Advisors. He's the chief compliance officer for a company  
12 that you no longer work for, right?

13 A Correct, but he has personal liability for violations of  
14 the Advisers Act.

15 Q Okay. And you thought it was your responsibility to  
16 remind him of that, right?

17 A It was my view of the situation, and at least he could  
18 evaluate it himself if I reminded him of it, yes.

19 Q Uh-huh. What does it mean to do a workaround? What did  
20 you mean by that?

21 A There's a concept in compliance called you can't do  
22 something indirectly that you can't do directly, and that's  
23 what I was referring to there.

24 Q Does that mean that he was trying to effectuate the trade  
25 without the assistance of the Advisors?

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1 A I believed he was trying to do it without compliance and  
2 without proper regard for investors, so that's why I described  
3 it as a workaround.

4 MR. MORRIS: I move to strike.

5 THE COURT: Sustained.

6 BY MR. MORRIS:

7 Q I'm asking you a very specific question.

8 MR. MORRIS: Can I have a ruling, Your Honor? Thank  
9 you.

10 THE COURT: Yes.

11 BY MR. MORRIS:

12 Q Did you, when you used the phrase workaround, did you mean  
13 that he was trying to effectuate the trade without relying on  
14 the Advisors' employees?

15 A No.

16 Q Okay. But you found out about the trade and you thought  
17 it was a good idea to send Mr. Surgent this email, right?

18 A Yes.

19 Q Can you read the last line of your email?

20 A (reading) You might want to remind him and yourself that  
21 the chief compliance officer has personal liability.

22 Q Personal liability for effectuating a trade that Mr. Seery  
23 had authorized, correct?

24 A For violating the Advisers Act, is what I meant.

25 Q Uh-huh. Did you report anybody to the SEC?

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1 A I would be happy to if it's permitted by the Court.

2 Q But you didn't -- you never asked the Court to do that,  
3 right?

4 A No.

5 Q It didn't seem important enough for you to take that step,  
6 right? But you wanted -- you had to make sure that you told  
7 Mr. Surgent that he might be personally liable, right? That  
8 was what you needed to do?

9 A Could you repeat that question, please?

10 Q You needed to make sure that Mr. Surgent knew that you  
11 were threatening him with personal liability if he followed  
12 Mr. Seery's instructions, right?

13 A No.

14 Q As a factual matter, you never asked Mr. Seery why he  
15 wanted to make these trades, right?

16 A I asked Joe Sowin to ask him.

17 Q As a factual matter, you never asked Mr. Seery why he  
18 wanted to make these trades, correct?

19 A I believe I wasn't permitted to talk to him.

20 Q In November 2020? What would have prevented that?

21 A I believe Scott Ellington was the go-between at that  
22 point in time.

23 Q Is it your testimony that you never spoke with Jim Seery  
24 in November 2020?

25 A I believe in an unauthorized fashion, the day after

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1 Thanksgiving I talked to him, but that's the only day I can  
2 remember.

3 Q Should we call up the email where you threatened him not  
4 to do it again?

5 A That was an email.

6 Q Ah. So you could communicate by email? Did you ever send  
7 Mr. Seery an email and say, Why do you want to do these  
8 trades?

9 A No.

10 Q But somehow you thought you couldn't even speak to him?  
11 You couldn't speak to him but you can send him emails? That's  
12 the world that you live in, right? That's what you think?

13 A I have no comment on that.

14 Q All right. So, after this exchange, --

15 MR. MORRIS: And this is what I read out-of-order  
16 before, Your Honor. We moved to the December 16th hearing.  
17 BY MR. MORRIS:

18 Q And you remember, Mr. Dondero, that the Defendants made  
19 that motion that asked the Court to stop the Debtor from  
20 trading in the CLO assets? Do you remember that?

21 A I'm sorry. You're asking me do I remember letters were  
22 sent? Yes.

23 Q No. Do you remember that there was a hearing in mid-  
24 December?

25 A Yes.

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1 Q Okay.

2 MR. MORRIS: And Your Honor, for the record, Exhibit  
3 A is the Debtor -- is the Defendants' motion. Exhibit B is  
4 the transcript that we had looked at earlier or that I had  
5 read portions of earlier.

6 THE COURT: Okay.

7 MR. MORRIS: And Exhibit C is the order that the  
8 Court entered denying the Defendants' motion.

9 Can we call up Exhibit C, please?

10 BY MR. MORRIS:

11 Q All right. Do you see --

12 MR. MORRIS: If we could scroll to the very top,  
13 please. All right.

14 BY MR. MORRIS:

15 Q Do you see this document is dated December 18th, sir?

16 A Yes.

17 Q And if we scroll down, this is the order denying the  
18 motion of the Advisors and the Funds for an order trying to  
19 temporarily restrict the Debtor's ability as portfolio manager  
20 from initiating sales. Do you see that?

21 A Yes.

22 Q Okay. So, this is December 18th. And if you'll recall,  
23 the TRO was issued against you on December 10th. Do you  
24 remember that?

25 A I don't believe it was the 10th.



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1 Q Okay. It was in December, and it was just before this.

2 Is that fair?

3 A I believe there was an intent, and then the actual filing  
4 I think was much later. I don't have -- I don't have the  
5 knowledge. I don't have the knowledge of when the TRO was put  
6 in place.

7 Q Okay. (Pause.) Okay. We talked earlier about how you  
8 interfered with Mr. Seery's trading activities around  
9 Thanksgiving. Do you remember that?

10 A Yes, I do. I do remember the trading then, also.

11 Q Okay. And do you remember that just before Christmas you  
12 interfered with Mr. Seery's tradings again?

13 A Yes.

14 Q Okay.

15 MR. MORRIS: If we can call up Exhibit K from Docket  
16 No. 46, which I have shared with counsel?

17 THE WITNESS: You know what?

18 BY MR. MORRIS:

19 Q Yeah.

20 A Let's handle these each incident one at a time. And I  
21 don't want to use the word "interfering" or accept the word  
22 "interfering" as an answer because I think my participation in  
23 each situation was very different.

24 MR. MORRIS: All right. Can we scroll down?

25 BY MR. MORRIS:

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1 Q This is a letter that my firm wrote to Mr. Lynn. Mr. Lynn  
2 is your lawyer. Is that right?

3 A Yes.

4 MR. MORRIS: And if we could start down at the first  
5 page. We've seen these letter before. A little further.

6 BY MR. MORRIS:

7 Q Do you see there is a reference there to the Debtor's  
8 management of CLOs?

9 A Yes.

10 Q And there is a recitation of the history that we talked  
11 about a bit earlier. If we -- if we look further in that  
12 paragraph to around Thanksgiving, when you intervened to block  
13 the trades.

14 A Yes, I see that sentence.

15 Q Okay.

16 MR. MORRIS: And then if we can go to the next page,  
17 the next paragraph. Yeah, that's where.

18 BY MR. MORRIS:

19 Q Then we referred to the December 16th hearing, right? And  
20 then the next paragraph says, "On December 22, 2020" --

21 MR. MORRIS: Can you scroll down just a little bit?  
22 Nope, the other way. Yeah, right there.

23 BY MR. MORRIS:

24 Q "On December 22, 2020, employees of NPA and HCMFA" --  
25 those are the Advisors, right?

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1 A Yes.

2 Q -- "notified the Debtor that they would not settle the  
3 CLO's sale of the AVYA and SKY security." Have I read that  
4 correctly?

5 A Yes.

6 Q All right. On or about December 22nd, you personally  
7 instructed employees of the Advisors not to trade the SKY and  
8 AVYA securities that Mr. Seery had authorized. Is that right?

9 A No.

10 Q You personally instructed, on or about December 22, 2020,  
11 employees of those Advisors to stop doing the trades that Mr.  
12 Seery had authorized with respect to SKY and AVYA, right?

13 A No. You know, we need to look at source documents. My  
14 recollection is I encouraged Compliance to look at those  
15 trades. But I'm willing to be -- I'm willing to be -- get  
16 source documents again, if you'd like.

17 Q All right. My source document is your prior testimony.

18 MR. MORRIS: Can we please call up Exhibit NNNN at  
19 Page 73? Beginning at Line 2? Okay.

20 BY MR. MORRIS:

21 Q Page 73, beginning at Line 2, did you give the following  
22 answer to my question?

23 "Q And you personally instructed, on or about  
24 December 22nd, 2020, employees of those Advisors to  
25 stop doing the trades that Mr. Seery had authorized

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1 with respect to SKY and AVYA, right?

2 "A Yeah. Maybe we're splitting hairs here, but I  
3 instructed them not to trade them. I never gave  
4 instructions not to settle the trades that occurred,  
5 but that's a different ball of wax."

6 Q Did you give that answer, sir?

7 A I believe I confused dates or misspoke there, but I did  
8 give that answer.

9 Q Okay. Thank you. Stated a different way, you personally  
10 instructed the Advisors' employees not to execute the trades  
11 that Mr. Seery had authorized but which had not yet been made,  
12 right?

13 A No. Not -- not on December 22nd. That was in November.  
14 November 22nd, I did not do that.

15 Q Okay.

16 MR. MORRIS: Can we go to Page 76, please? Line 15.

17 BY MR. MORRIS:

18 Q Did you give this answer to my question?

19 "Q And you would agree with me, would you not, that  
20 you instructed the employees of the Advisors not to  
21 execute the very trades that Mr. Seery identifies in  
22 this email, correct?

23 "A Yes."

24 Q Did you give that answer, sir?

25 A Well, like I said, I -- I confused the Thanksgiving

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1 trades, the week of Thanksgiving, with my more nuanced  
2 responses to later trades.

3 MR. MORRIS: I move to strike, Your Honor. It's a  
4 very simple question.

5 THE COURT: Granted.

6 BY MR. MORRIS:

7 Q Did you give that answer to my question, sir?

8 A I -- yes, I did.

9 Q Thank you. Now, all of this is just a week after that  
10 December 16th hearing, right?

11 A Yes.

12 Q And right after that hearing, the K&L Gates firm sent, on  
13 behalf of the Defendants, more letters to the Debtors, right?

14 A Yes.

15 MR. MORRIS: Can we please pull up the first letter?  
16 It's Exhibit DDDD. And if we can go not to our response but  
17 to the original letter that was sent that's attached to this.  
18 I think it is Exhibit A. Right there.

19 BY MR. MORRIS:

20 Q That's the first of the letters, December 22, 2020. Do  
21 you see that?

22 A Yes.

23 MR. MORRIS: And can we scroll down to the end of the  
24 letter to see what the request is here? Right there.

25 BY MR. MORRIS:

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1 Q Can you read the end of that letter right there, sir?

2 A (reading) Sincerely, A. Lee Hogewood, III.

3 Q Nice. I meant the actual substance.

4 A (reading) For the foregoing and other reasons, we request  
5 that no further CLO transactions occur, at least until the  
6 issues raised by and addressed in the Debtor's plan are  
7 resolved at the confirmation hearing.

8 Q Okay. And that's similar in substance to the letter that  
9 was sent on behalf of the Defendants on October 16th that you  
10 saw and approved, right?

11 A I did not see and approve.

12 Q All right. The record will speak for itself. And it's  
13 similar in substance to the letter that was sent on November  
14 24th by the K&L Gates clients on behalf of the Defendants,  
15 right?

16 A I don't know.

17 Q We looked at it before. Should we get it again?

18 A It's a -- all the letters, as far as I understand, were  
19 similar in requesting that the -- the beneficial owners of the  
20 CLOs were requesting that no wholesale liquidation of their  
21 assets occur. That's how I understand it.

22 Q And that's --

23 A You asked my understanding. That's my understanding.

24 Q Okay. And notwithstanding the request in this letter,  
25 when you were -- when you were talking to the traders at your

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1 shop, you actually told them that the Debtor was instructed  
2 not to do these trades, right?

3 A Are you parsing "instructed" versus "requested"? I don't  
4 understand the question.

5 Q I am, in fact. You used a very different phrase when  
6 speaking to your employees than you did -- then your lawyers  
7 did when they wrote to the Debtor, right?

8 A It seems to be a difference, yes.

9 Q Okay. So, this is on December 22nd. Now, the night  
10 before, you participated in a meeting with Grant Scott and  
11 with the lawyers for the Defendants, right, to talk about what  
12 you guys were going to do with respect to the Debtor's  
13 management of the CLOs. Isn't that right?

14 A I don't remember specifically.

15 Q Okay. But is it fair to say it's true, is it not, that  
16 during the week leading up to Christmas you participated in  
17 several phone calls with the K&L Gates firm and with other  
18 members of the Defendants' -- the Advisors, Mr. Sowin or Mr.  
19 Post or Mr. Sauter, and the lawyers, right? You were all  
20 together talking about these issues during the week before  
21 Christmas, right?

22 MR. RUKAVINA: Your Honor, I'm going to object. If  
23 counsel is asking what was discussed with counsel present for  
24 the purpose of legal advice, that is an inappropriate  
25 question.

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1 THE COURT: Okay.

2 MR. MORRIS: I'm certainly not. I'm asking if the  
3 conversations took place.

4 MR. RUKAVINA: And the conversations -- the question  
5 was, did they discuss what to do with respect to the CLOs?  
6 That would be privileged, Your Honor. If they discussed  
7 football, that's not privileged, but what to do with the CLO  
8 management agreements is privileged.

9 THE COURT: Okay. I sustain.

10 MR. MORRIS: Can we please call up Exhibit TT? I'm  
11 sorry, TTT. Nope, TTTT. TTTT. Can you scroll down a bit?  
12 Right there.

13 BY MR. MORRIS:

14 Q Do you see -- this is an email from Grant Scott to Scott  
15 Ellington; do you see that?

16 A Yes.

17 Q And at this point, Mr. Ellington is still working for the  
18 Debtor, right?

19 A Yes. I believe he was settlement counsel.

20 Q Uh-huh. And do you see that this is an email that refers  
21 to your availability for a 9:00 a.m. call?

22 A Yes.

23 Q And do you see that there's a question as to whether the  
24 K&L people can make it?

25 A Yes.



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1 Q And you understand that refers to K&L Gates, right?

2 A I -- I guess so.

3 Q And so does this refresh your recollection that at or  
4 around Christmas, or in the days leading up to Christmas, you  
5 participated in calls with Mr. Scott, with Scott Ellington,  
6 and with the K&L Gates folks?

7 A I -- I don't know. I don't know if -- if I actually did  
8 or not. But I was highly concerned with inappropriate  
9 behavior.

10 Q And you were available -- and did you tell somebody that  
11 you were available for this call on the morning of the 23rd?

12 A I don't know.

13 Q This is the day after you stopped the trades, right?

14 A Again, I didn't stop the trades on the 23rd.

15 Q You stopped them on the 22nd, right?

16 A No, I stopped them on the week of Thanksgiving.

17 MR. MORRIS: Can we go back to Exhibit NNNN, the  
18 transcript? Page 73?

19 BY MR. MORRIS:

20 Q Let me see if I can refresh your recollection. Tab 2.

21 Did you give this answer to this question:

22 "Q And you personally instructed, on or about  
23 December 22, 2020, employees of those Advisors to stop  
24 doing the trades that Mr. Seery had authorized with  
25 respect to SKY and AVYA, right?

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1 "A Yeah. Maybe we're splitting hairs here, but I  
2 instructed them not to trade them."

3 Q Did you give that answer to the question?

4 A Yes.

5 Q Okay.

6 A But we -- we corrected.

7 Q All right. You didn't correct it at the preliminary  
8 injunction hearing, did you?

9 A No, I did not.

10 Q Okay. So as far as the Court knows as of this moment,  
11 that's the only testimony that you've ever given on the topic,  
12 right?

13 A I'm trying to give some now.

14 Q Okay. And on December 22nd, that's the date that the  
15 first letter was also sent, right, we just looked at?

16 A All right. Okay.

17 Q You agree with that, right?

18 A I don't remember the date on the letter. If you want to  
19 pull it up, I'll say it is the 22nd or the 23rd, whatever it  
20 says. I don't know.

21 Q Sure.

22 MR. MORRIS: Let's go back to DDDD, please. And if  
23 we can just go to the top of the letter. Thank you.

24 BY MR. MORRIS:

25 Q K&L Gates. December 22nd. That's the letter, right?

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1 A Yes.

2 Q And according to the testimony that you gave at the  
3 preliminary injunction hearing on January 8th, that's the day  
4 that you also stopped AVYA and SKY trades, right?

5 A I'm not agreeing to that testimony. I am changing the  
6 testimony.

7 Q Okay. And then we just saw that other exhibit where they  
8 were trying to arrange a phone call with you, the K&L Gates  
9 lawyers, and Mr. Ellington and Grant Scott for the 23rd. Do  
10 you remember that one we just looked at?

11 A Yes.

12 Q And then later on the day on the 23rd, K&L Gates sends  
13 another letter, right?

14 MR. MORRIS: Can we call up EEEE? And can we scroll  
15 to the Exhibit A, to our response? Right there.

16 BY MR. MORRIS:

17 Q That's the 23rd. Do you see that letter?

18 A Yes.

19 Q Again, this is one week after the hearing, right?

20 A Yes.

21 Q Okay. And this is a letter where K&L Gates states on  
22 behalf of the Defendants that they are contemplating taking  
23 steps to terminate the CLO management agreements, right?

24 A I don't know. Can you scroll down, if you want to ask me

25 --

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1 Q Sure.

2 MR. MORRIS: Can we flip to the next page, please?

3 Keep going. Right there.

4 BY MR. MORRIS:

5 Q Can you read the first sentence of the paragraph  
6 beginning, "Consequently"?

7 A (reading) Consequently, in addition to our request of  
8 yesterday, where appropriate and consistent with the  
9 underlying contractual provisions, one or more of the entities  
10 above intend to notify the relevant Trustees and/or Issuers  
11 that the process of removing the Debtor as fund manager should  
12 be initiated, subject to and with due deference to the  
13 applicable provisions of the United States Bankruptcy Code,  
14 including the automatic stay of Section 362.

15 Q Okay. So, on December 23rd, the Defendants told the  
16 Debtor that they intended to notify the relevant Trustees  
17 and/or the Issuers that the process of removing the Debtor as  
18 the fund manager should be initiated, right?

19 A That's what it says.

20 Q And then the K&L Gates firm sent yet another letter to the  
21 Debtor, right? Do you remember that?

22 A No.

23 MR. MORRIS: Can we get up FFFF, please?

24 BY MR. MORRIS:

25 Q This is dated December 31st. Do you see that?

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1 A Yes.

2 MR. MORRIS: Can we scroll down a bit?

3 BY MR. MORRIS:

4 Q Do you recall this is the letter where they claim that  
5 they've been damaged by the Debtor's eviction of you from the  
6 Highland offices?

7 A I don't remember specifically, but that's true.

8 Q Okay. So we just saw these three letters, in addition to  
9 your -- the -- at least the testimony you gave regarding your  
10 conduct on the 22nd of December. You were aware that all of  
11 these letters were being sent by K&L Gates, correct?

12 A Yes, generally.

13 Q And you were supportive of the sending of these letters,  
14 right?

15 A Absolutely. They were appropriate.

16 Q And you pushed and encouraged the chief compliance officer  
17 and the general counsel to send these letters, right?

18 A I'd like to think that they believed and they acted  
19 largely on their own judgment, but I strongly believed it was  
20 a violation of the Advisers Act, and stated that numerous  
21 times.

22 Q Sir, you pushed and encouraged the chief compliance  
23 officer and the general counsel to send these letters,  
24 correct?

25 A No, I wouldn't use those words.

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1 Q Do you understand that the Debtor demanded that the K&L  
2 Gates clients or the Defendants withdraw these letters?

3 A I believe they requested it. I didn't -- I didn't know  
4 the former, what you mean by demand, but --

5 Q Well, it's fair to say you never instructed the K&L Gates  
6 clients or the Defendants to withdraw these letters, right?

7 A No. I still believe they are appropriate and accurate. I  
8 wouldn't withdraw them today.

9 Q Okay. Sir, throughout 2020, when you were still the  
10 portfolio manager at Highland Capital Management, it's true  
11 that you sold AVYA shares on numerous occasions on behalf of  
12 both the CLOs and on behalf of the Funds outside of the  
13 holdings of the CLOs?

14 A Always with a business purpose, yes. That is still a  
15 small percentage of our total AVYA holdings, and we still  
16 liked AVYA.

17 Q Sir, I'm going to ask you just one more time. In 2020,  
18 you sold AVYA stock many times on behalf of the CLOs and on  
19 behalf of the Funds?

20 A Yes.

21 Q Thank you.

22 MR. MORRIS: No further questions, Your Honor.

23 THE COURT: All right. Mr. Rukavina?

24 MR. RUKAVINA: Your Honor, I will reserve my  
25 questions to my case in chief, and I would request a very

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1 short restroom break.

2 THE COURT: All right. Mr. Dondero, we're --

3 MR. RUKAVINA: And I do mean short. I will --

4 THE COURT: I'm sorry. What?

5 MR. RUKAVINA: And I do mean short, Your Honor. I

6 just need to run and be back -- I can be back in three

7 minutes.

8 MR. MORRIS: No problem, Your Honor.

9 THE COURT: Okay. You're finished for now, Mr.  
10 Dondero, but you're going to be recalled, so hang tight.

11 Your next witness, Mr. Morris?

12 MR. MORRIS: The Debtor calls Jason Post.

13 MR. RUKAVINA: Your Honor, may I be excused to run to  
14 the restroom and Mr. Vasek take over for a few minutes?

15 THE COURT: Oh. Okay. I'm sorry. If you made that  
16 request, I didn't hear you. So that's fine.

17 All right. Mr. Post, --

18 MR. MORRIS: Your Honor, can we just -- I apologize  
19 for interrupting. Can we just direct Mr. Dondero not to speak  
20 with anybody about anything at any time? Not by phone, not by  
21 text, not by email, not by meeting, not by anything? Because  
22 he's still on the stand.

23 MR. RUKAVINA: Well, Your Honor, anything at any  
24 time. I think I know that Mr. Morris is being facetious, but  
25 if he's trying to get the rule invoked, that's different.

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1 MR. MORRIS: Okay. I'm trying to get the rule  
2 invoked.

3 THE COURT: Okay. All right. I'm not going to make  
4 that instruction. All right. So, --

5 MR. RUKAVINA: I've got to run to the restroom. I'll  
6 be -- listen for the instructions.

7 THE COURT: Jason Post, you've been called to the  
8 witness stand. Could you say, "Testing, one, two"?

9 MR. POST: (Indiscernible.)

10 THE COURT: All right. Please raise --

11 MR. POST: Testing, one, two.

12 THE COURT: Thank you. Please raise your right hand.

13 JASON POST, DEBTOR'S WITNESS, SWORN

14 THE COURT: All right. Mr. Morris, go ahead.

15 DIRECT EXAMINATION

16 BY MR. MORRIS:

17 Q Good afternoon, Mr. Post. We met the other day. Do you  
18 remember that?

19 A I do.

20 Q Okay. So, again, just to remind you, my name is John  
21 Morris. I'm an attorney at Pachulski, Stang, Ziehl & Jones.  
22 We represent the Debtor here. You're the chief compliance  
23 officer for each of the Defendants; is that right?

24 A I am.

25 Q And in your role as the chief compliance officer, your job



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1 is to act as a liaison between regulatory bodies and internal  
2 working groups with respect to the rules and regulations for  
3 the funds advised by the Advisors; is that correct?

4 A Correct, that's -- that's the (inaudible). Correct.

5 Q All right. And internally, you report to Mr. Dondero.  
6 Isn't that right?

7 A Correct.

8 Q And you've been working with Mr. Dondero since 2008 when  
9 you joined Highland Capital Management, correct?

10 A I worked at Mr. Dondero's firm since 2008, but I reported  
11 to other direct reports during that time outside of Mr.  
12 Dondero. I started to report to him directly in October of  
13 2020.

14 Q Okay.

15 A (overspoken)

16 Q But you've -- you've worked at Highland -- you worked at  
17 Highland since 2008, fair?

18 A Yes.

19 Q Okay. And you were employed by Highland up until October  
20 2020, correct?

21 A Yes.

22 Q Okay. And at that time, Mr. Dondero left and he went to  
23 NexPoint and you went to NexPoint. Is that right?

24 A Shortly after Mr. Dondero left Highland, I transitioned  
25 over to NexPoint.

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1 Q And that's where Mr. Dondero is, right?

2 A Correct.

3 Q Okay. You joined Highland in 2008, and in around 2011 you  
4 joined Highland's internal legal and compliance team, correct?

5 A That's correct.

6 Q And in 2015, while still employed by Highland, Mr. Dondero  
7 appointed you as the chief compliance officer of the Advisors  
8 and the Funds, right?

9 A Technically, the retail board appointed me the CCO of the  
10 Funds, and then I was appointed internally. I believe Mr.  
11 Dondero was part of that decision for the Advisors.

12 Q Had you ever worked with the retail boards before that?

13 A There was about -- I worked with them for about a year  
14 prior to that.

15 Q Okay. And you've served as the CCO, the chief compliance  
16 officer, of each of the Advisors and each of the Funds since  
17 September 2015 on a continuous basis, right?

18 A That is correct.

19 Q You know Thomas Surgent; is that right?

20 A I do.

21 Q Mr. Surgent has been the Debtor's chief compliance officer  
22 since around 2013 or 2014; is that right?

23 A I believe -- uh -- I -- I think that's correct. It may be  
24 a year or two off. He took the role after the former CO  
25 resigned, which I don't know if that was 2011 or 2012. I

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1 can't recall specifically.

2 Q Okay. But he's been -- he's been in that position for a  
3 long time, right? Fair enough?

4 A Yes, that's fair.

5 Q And during the whole time that you were employed by  
6 Highland and serving as the chief compliance officer for the  
7 Funds and the Advisors, you reported to Mr. Surgent?

8 A Internally. Yes, that's correct.

9 Q Yeah. And you respect Mr. Surgent; isn't that right?

10 A During the time I reported to him, yes.

11 Q Yeah. And you believed that he did his job well, right?

12 A As far as I could see, yes.

13 Q You viewed it as -- you viewed him as a mentor, did you  
14 not?

15 A Yes. I mean, when I joined the legal compliance team, you  
16 know, he was there. He was a senior member on the team. And  
17 he, you know, helped educate me, along with other, you know,  
18 external sources, et cetera, on the compliance function.

19 Q Uh-huh. He trained you for the work you're doing now,  
20 right?

21 A With respect to the on-the-job training, yes.

22 Q Uh-huh. Despite all of that, throughout all the  
23 proceedings, the court hearings, all of the issues that we're  
24 talking about in this case, you never, ever stopped to discuss  
25 any of these issues with your former mentor, Mr. Surgent; is

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1 that right?

2 A The -- with respect to, for example, the trade (garbled)  
3 that you were talking about earlier?

4 Q Let's do it this way. From the time that you left  
5 Highland until today, you've never discussed with Mr. Surgent  
6 Mr. Seery's trades; is that right?

7 A I believe there was a discussion after -- I can't recall  
8 exactly the context. There was a discussion after the trades  
9 in the November time frame. And then I believe there was a --  
10 I responded to an email exchange in the December time frame  
11 regarding booking of the trades.

12 Q Sir, you -- you've never spoken with Mr. Surgent about any  
13 issue concerning the Debtor's management of the CLOs, correct?

14 A I don't recall directly, no.

15 Q In fact, you're not aware of anyone acting on behalf of  
16 the Advisors or the Funds who has reached out to Mr. Surgent  
17 to get his views on any of the issues related to this motion.  
18 Isn't that right?

19 A I believe previously there's correspondence that Mr.  
20 Dondero had with Surgent. But aside from that, I'm not aware  
21 of any.

22 Q Is that the email where he reminded him of his personal  
23 liability? Is that the one you're thinking of?

24 A Correct.

25 Q Yeah. Do you know of any other communication -- do you

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1 know of any other communication that any of the Defendants had  
2 with Mr. Surgent concerning the Debtor's management of the  
3 CLOs?

4 A With Mr. Surgent directly, I don't -- I don't -- I don't  
5 believe so.

6 Q Yeah. You graduated from Baylor; is that right?

7 A Correct.

8 Q But you don't have any certifications or licenses  
9 applicable to your work, correct?

10 A Correct.

11 Q You don't have any specialized training or education  
12 that's relevant to your work as a chief compliance officer,  
13 correct?

14 A Correct.

15 Q Your job -- your training is limited to on-the-job  
16 training; isn't that right?

17 A That is correct.

18 Q You've never spoken at any conferences on compliance  
19 matters, have you?

20 A Spoken, no. Attended, yes.

21 Q You don't recall presenting any papers at any compliance-  
22 related conferences, do you?

23 A That is correct.

24 Q You've never published anything in connection with your  
25 work as a compliance officer; isn't that right?

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1 A Not that I can recall.

2 Q Let's talk about the CLO management agreements briefly.

3 You're aware that the Debtor is party to certain management  
4 agreements pursuant to which it serves as the portfolio  
5 manager for certain CLOs, correct?

6 A Correct.

7 Q And until your lawyers recently asked you to review them,  
8 you last had reason to review a CLO management agreement about  
9 five or six years ago; isn't that right?

10 A I believe that's correct.

11 Q And the request from your lawyers to look at the CLO  
12 management agreements, that request came in late November/  
13 early December; isn't that right?

14 A I believe that's around the right time frame.

15 Q And the portions of the management agreements that you  
16 read were the portions that your counsel asked you to read;  
17 isn't that right?

18 A Correct.

19 Q And other than the general recollection of having read  
20 something about the rights of preference shareholders, you  
21 don't recall much about the agreements at all; isn't that  
22 right?

23 A I mean, the agreements are very lengthy in nature. You  
24 know, I think it was probably rights that the preference  
25 shareholders had, and, you know, possibly indemnification

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1 provisions. But aside from that, I don't recall anything else  
2 specifically right now.

3 Q As the chief compliance officer of the Advisors and the  
4 Funds, you don't know whether any of them are party to the CLO  
5 management agreements between the Debtors and -- between the  
6 Debtor and the Issuers, correct?

7 MR. RUKAVINA: And Your Honor, I would just object to  
8 the extent that that calls for a legal conclusion. This  
9 witness is not a lawyer.

10 THE COURT: Overruled.

11 THE WITNESS: I'm sorry. Can you repeat the  
12 question, please?

13 BY MR. MORRIS:

14 Q Sure. As the chief compliance officer for each of the  
15 Defendants, you don't know whether any of them are party to  
16 the CLO management agreements between the Debtor and the  
17 Issuers, correct?

18 A They're not the named collateral manager, but they're a  
19 security holder of the CLOs, so they should be entitled to,  
20 you know, the rights that those security holders are afforded  
21 under those agreements.

22 MR. MORRIS: I move to strike, Your Honor.

23 THE COURT: Granted.

24 BY MR. MORRIS:

25 Q All right. So, now, Mr. Post, I know this is difficult,

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1 and I do appreciate that it's difficult just to focus on the  
2 question. Your counsel will have the opportunity to ask you  
3 whatever he wants. But I would respectfully request that you  
4 listen to my question and only answer my question. It really  
5 is very likely to require just a yes or no answer.

6 So, let me try again. As the chief compliance officer of  
7 the Advisors and the Funds, you don't know whether any of them  
8 are a party to the CLO management agreements between the  
9 Debtor and the Issuers, correct?

10 A I don't believe they are, correct.

11 Q Okay. Let's talk about that prior hearing. Now, by the  
12 way, Mr. Post, did you listen in to Mr. Dondero's testimony  
13 earlier?

14 MR. RUKAVINA: Mr. Post was here with me --

15 MR. MORRIS: Yeah.

16 MR. RUKAVINA: -- as my representative..

17 MR. MORRIS: Okay. I -- there's no problem. I just  
18 -- I just -- that way there's some background and he has some  
19 context. That's the only reason I asked.

20 BY MR. MORRIS:

21 Q You're aware that the Funds and the Advisors previously  
22 filed a motion in the Bankruptcy Court asking the Court to  
23 institute a pause in the Debtor's ability to sell CLO assets,  
24 correct?

25 A Correct.



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1 Q And you recall that that happened in mid-December, around  
2 December 16th; is that right?

3 A That sounds correct.

4 Q And in connection with that motion, you provided  
5 information to counsel that they requested from you, right?

6 A Yes. I was part of the working -- internal working group,  
7 with internal and external counsel.

8 Q Other than providing that information, you generally  
9 agreed with the position being taken that it wasn't in the  
10 best interest of the Funds involved for Highland to make any  
11 trades; isn't that right?

12 A Yes. And that was based off of discussions with the  
13 investment professionals.

14 Q And the investment professionals are Mr. Sowin and Mr.  
15 Dondero, correct?

16 A Correct.

17 Q Okay. So you're the chief compliance officer, and they  
18 made a motion that was based on the idea that the fund  
19 manager, Highland Capital Management, shouldn't trade any  
20 assets in the CLOs. Do I have that right?

21 A I believe that's what the motion contained.

22 Q But you don't even remember who authorized the filing of  
23 the motion; isn't that right?

24 A I believe it was pursuant to discussions internally and  
25 with external counsel, and I believe Mr. Norris signed the

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1 filing, if I -- if I recall correctly.

2 Q Sir, you don't remember who authorized the filing of the  
3 motion, correct?

4 A It -- it was pursuant to a discussion with the investment  
5 professionals and counsel, and it was in the best interest of  
6 the Funds to make the filing. So I think it was a  
7 collaborative determination.

8 MR. MORRIS: I move to strike, Your Honor.

9 THE COURT: Granted.

10 MR. MORRIS: Ms. Canty, can we please pull up Mr.  
11 Post's deposition transcript? And let's go to Page 35. Line  
12 21. Okay.

13 BY MR. MORRIS:

14 Q Do you remember giving the following answer to the  
15 following question:

16 "Q Who authorized the filing of this motion?

17 "A I can't recall specifically who authorized it."

18 Q Did you give that answer to my question just the other  
19 day?

20 A That's -- that's what it says there, yes.

21 Q And it says that because that's, in fact, what you  
22 testified to under oath the other day, right?

23 A Correct.

24 Q Okay. And the one thing that you know for certain is that  
25 you didn't authorize the filing of the motion; isn't that

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1 right?

2 A I didn't sign anything in connection with the filing.

3 Q All right. Listen carefully to my question. The one  
4 thing that you're certain of is that you did not authorize the  
5 filing of the motion as the chief compliance officer of the  
6 Debtors, correct?

7 A Correct.

8 Q Okay. But you did participate in conversations with Mr.  
9 Dondero and counsel concerning the motion; is that fair?

10 A There were conversations with Mr. Dondero initially, and  
11 then the conversations were then more so with internal and  
12 external counsel in terms of the filing.

13 Q Okay. So they started just with Mr. Dondero, and then  
14 they moved on to counsel. Is that what you're saying?

15 A I can't recall specifically. It may have been part of a  
16 discussion internally with internal counsel and Mr. Dondero.  
17 I just -- I can't recall the specifics.

18 Q Okay. But Mr. Dondero certainly supported the filing of  
19 the motion, right?

20 A Yes. From an investment perspective, it was in the best  
21 interest of the Funds in terms of the sales that were  
22 occurring.

23 Q Okay.

24 MR. MORRIS: I move to strike.

25 THE COURT: Granted.

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1 BY MR. MORRIS:

2 Q It's a very simple question. Mr. Dondero supported the  
3 filing of the motion; is that correct?

4 A Yes.

5 Q You did not file a declaration in support of the motion;  
6 is that correct?

7 A Me personally, no.

8 Q Okay. So you're the chief compliance officer of the  
9 Defendants; is that right?

10 A Correct.

11 Q But instead of you filing a declaration, Mr. Norris filed  
12 the declaration. Do I have that right?

13 A Correct. My understanding is one person needs to sign the  
14 declaration.

15 Q And remind me, what is Mr. Norris's position? He's the  
16 executive vice president, right?

17 A Correct.

18 Q What responsibilities does he have? Does he have trading  
19 responsibility?

20 A He does not.

21 Q Does he have compliance responsibility?

22 A Not directly, no.

23 Q Does he have investment responsibility?

24 A He's familiar with the composition of the portfolios in  
25 his role as a product strategy team member.

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1 Q Does he have investment responsibility, sir?

2 A He is not making direct investments for the -- for the  
3 Funds.

4 Q Okay. So he doesn't -- and he's not a compliance person,  
5 right?

6 A Correct.

7 Q And he's not a lawyer, right?

8 A Correct.

9 Q But nevertheless, as the chief compliance officer, you  
10 believed that Mr. Norris's declaration contained all of the  
11 information that was relevant to support the motion, right?

12 A It was a determin... or a collaborative determination in  
13 conjunction with counsel. But I, you know, I don't -- yeah,  
14 it was -- it was a collaborative determination. There were  
15 multiple elements that went into that -- the letter.

16 Q Okay. You believed that the motion and Mr. Norris's  
17 declaration contained all the relevant facts that supported  
18 the Advisors and the Funds' requests to the Court, correct?

19 A Yes.

20 Q In fact, you believed that Mr. Norris was the most  
21 knowledgeable person to testify on behalf of the Movants;  
22 isn't that right?

23 A I think it was -- he was identified pursuant to  
24 discussions with counsel to be the most knowledgeable.

25 Q I'm going to ask you just about you and not counsel. You

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1 believed at the time that Mr. Norris was the most  
2 knowledgeable witness to testify on behalf of the Movants;  
3 isn't that right?

4 A Yes.

5 Q And you didn't testify -- not only didn't you submit a  
6 declaration, but you didn't testify at the hearing, did you?

7 A Correct on both.

8 Q Okay. And you listened to parts of the hearing, but not  
9 all of it, because you were busy doing other stuff, right?

10 A Correct.

11 Q You didn't listen to Mr. Norris's testimony at all, right?

12 A I don't believe I did.

13 Q You didn't listen to the Court when the Court rendered its  
14 decision, did you?

15 A I don't -- I don't believe I did.

16 Q And you didn't read the transcript from the hearing, did  
17 you?

18 A I don't -- correct. I did not.

19 Q Okay. So in your capacity as the chief compliance  
20 officer, you didn't believe that you should take the time to  
21 review the transcript, did you?

22 A Correct. I mean, just it was filed based off of the  
23 belief that the -- that the trades weren't in the best  
24 interest, and I -- and no, I didn't read it personally.

25 Q And you didn't believe, in -- that in your capacity as the

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1 CCO, the chief compliance officer, that it was in the scope of  
2 your responsibility to listen to the hearing, correct?

3 A I was -- I wasn't asked to listen, and quite frankly, I  
4 don't -- I don't recall if I remember the timing, but I did  
5 not listen.

6 Q Okay. And in your capacity as the chief compliance  
7 officer, you didn't believe that it was in the scope of your  
8 responsibilities to listen to the hearing; isn't that right?

9 A Correct.

10 Q And because you didn't listen to the hearing or review the  
11 transcript, you were unaware of what the Court said or how  
12 Judge Jernigan described the motion or the people involved in  
13 presenting the case on behalf of the Defendants, right?

14 A Correct, but I -- I believe I probably would have received  
15 some guidance from counsel who attended or listened to the  
16 hearing.

17 Q Well, after the hearing was over, you did speak to Mr.  
18 Norris, right?

19 A Very briefly.

20 Q In fact, --

21 A Very --

22 Q In fact, the only thing you can remember about your  
23 conversation with Mr. Norris following the hearing was  
24 discussing with him how long the hearing took. Isn't that  
25 right?

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1 A Correct, because I -- I believe I heard it was a short  
2 hearing.

3 Q And that's -- that's all -- that's all you asked Mr.  
4 Norris about, about the hearing, right? That's all you  
5 remember talking to him about?

6 A I believe so, correct.

7 Q You don't recall discussing with Mr. Norris any other  
8 aspect of the hearing other than the length of time it took to  
9 conduct, correct?

10 A I don't recall specifically.

11 Q And you have no recollection of ever discussing with Mr.  
12 Dondero what happened at the hearing, right?

13 A I don't think I talked with Jim, Jim Dondero about that.

14 Q Nor did you talk to Mr. Dondero about the Court's ruling;  
15 isn't that right?

16 A Correct.

17 Q Okay. Let's talk about the events that occurred after the  
18 hearing, in the two weeks following the hearing. The  
19 Defendants for which you serve as the chief compliance officer  
20 sent three separate letters to the Defendant [sic], correct?

21 A If you could bring them up, I can confirm.

22 Q Sure.

23 MR. MORRIS: Let's start with DDDD, please. Okay.

24 Okay. Can we scroll to the attachment, please?

25 BY MR. MORRIS:



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1 Q All right. So this is the first letter, Mr. Post. Do you  
2 recall, on or about December 22nd, the K&L Gates firm sent, on  
3 behalf of the Advisors and Funds for which you serve as the  
4 chief compliance officer, a letter to the Debtors?

5 A Yes.

6 Q Okay.

7 MR. MORRIS: And can we call the next exhibit? I  
8 guess it's EEEE.

9 And I don't mean to be quick about these. If there's any  
10 reason that you want to read them, I wasn't planning on asking  
11 any questions about the substance of the letters of this  
12 witness.

13 BY MR. MORRIS:

14 Q But Mr. Post, I don't mean to be quick here. So if you  
15 think there's a benefit to you to reading the letters, please  
16 let me know.

17 Do you see, December 23rd, the next day, another letter  
18 was sent by K&L Gates?

19 A Yes.

20 Q Okay. And do you recall generally that the Advisors and  
21 Funds for which you serve as chief compliance officer told the  
22 -- told the Debtor that they were going to begin the process  
23 of seeking to terminate the CLO management agreements?

24 A I believe -- I believe that was contained in the letter,  
25 so long as it was done in compliance with the Court.

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1 Q Uh-huh. And do you remember there was a third letter that  
2 was sent?

3 A If you wouldn't mind pulling it up.

4 Q Yeah, not at all.

5 MR. MORRIS: Can we get the December 31st letter? I  
6 think it might be -- yeah.

7 BY MR. MORRIS:

8 Q Now, here's the December 31st letter. Do you remember the  
9 December 31st letter was the one where K&L Gates suggested  
10 that the Advisors and the Funds had suffered damages because  
11 the Debtor evicted Mr. Dondero from the Highland suite of  
12 offices?

13 A I -- I had heard of that letter being drafted, but I don't  
14 recall -- I obviously don't recall a specific date. But if it  
15 says December 31st, --

16 Q Okay. Mr. Dondero was one of the main voices in the  
17 decision to send these letters, correct?

18 A He was part of the preliminary conversation and expressed  
19 his opinion, and then myself and others internally, and with  
20 external counsel, then worked to draft the letters.

21 THE COURT: All right. Mr. Post, I am going to  
22 interject. I have heard Mr. Morris give you this instruction  
23 many times. Maybe it's time for me to. Maybe it's past time  
24 for me to.

25 Most of his questions simply require a yes or no answer.

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1 If you feel like there are other things that you want to  
2 supplement your testimony with, Mr. Rukavina is going to have  
3 a chance to question you, and that would be the situation  
4 where maybe you could give more fulsome answers. But please  
5 listen to the question. If it's a yes or no answer, that's  
6 all we want you to give right now. Okay? Got it?

7 THE WITNESS: Understood.

8 THE COURT: Okay.

9 MR. MORRIS: Thank you, Your Honor.

10 BY MR. MORRIS:

11 Q Mr. Post, Mr. Dondero was one of the main voices in the  
12 decision to send the letters; isn't that correct?

13 A He was a voice.

14 THE COURT: That was not a yes --

15 BY MR. MORRIS:

16 A And he was -- he --

17 THE COURT: Okay.

18 THE WITNESS: I'm --

19 THE COURT: Please, just a yes or no answer, okay?

20 THE WITNESS: No.

21 MR. MORRIS: Okay. Can we go to Mr. Post's  
22 transcript, please, Page 47? Line 22?

23 And Your Honor, when we pull it up on the screen, there is  
24 an objection, and I would respectfully request that the Court  
25 rule on the objection before I read the question and the

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1 answer.

2 THE COURT: All right.

3 MR. MORRIS: So if we could just call up Page 47  
4 beginning at Line 22.

5 MR. RUKAVINA: Page 47, Line 22.

6 THE COURT: Okay.

7 MR. MORRIS: One moment. Give her a moment. She's  
8 not there.

9 MR. RUKAVINA: Do you remember what exhibit this is?

10 MR. MORRIS: Yeah. There it is. Beginning at Line  
11 22, "Do you know?" And there is Mr. Rukavina's objection.

12 MR. RUKAVINA: Your Honor, it's very simple. He  
13 can't go into Mr. Dondero's head. But he -- but if Mr.  
14 Dondero told him something, that's different. So I think  
15 counsel can rephrase the question and it's perfectly fine, but  
16 he can't go into Mr. Dondero's state of mind.

17 MR. MORRIS: Your Honor, I'm not asking for Mr.  
18 Dondero's state of mind. I'm asking for Mr. Post's knowledge.  
19 "Do you know?"

20 THE COURT: Okay. I'll overrule the objection. He  
21 can answer.

22 BY MR. MORRIS:

23 Q All right. So, Mr. Post, do you remember giving this  
24 answer to the following question:

25 "Q Do you know whether Mr. Dondero supported the

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1 sending of each of these three letters?

2 "A I don't -- I don't recall specifically. I think  
3 he had his views on certain of the transactions that  
4 were occurring, and he wasn't in agreement with those  
5 transactions, as one of the main voices."

6 Q Do you see that?

7 A I do.

8 Q Does that refresh your recollection that Mr. -- that you  
9 testified that Mr. Dondero was one of the main voices?

10 A Yes.

11 Q Okay. Mr. Dondero --

12 MR. MORRIS: You can take that down now for the  
13 moment, please.

14 BY MR. MORRIS:

15 Q Mr. Dondero had his views on certain of the transactions  
16 that were occurring, and he wasn't in agreement with those  
17 transactions. Isn't that right?

18 A Yes.

19 Q All right. Going back to the letters that we just looked  
20 at quickly, you recall the Debtor responded to each of those  
21 letters, but as the chief compliance officer, you couldn't  
22 really recall what the Debtor said in response. Is that fair?

23 A I'm -- I believe they -- I'm sorry. I can't recall  
24 specifically without seeing the letters.

25 Q Okay. So you don't recall that, in response, the Debtor

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1 requested that the Advisors and the Funds withdraw the  
2 letters, right?

3 A I believe that was requested in the letters.

4 Q Okay. But the Funds and the Advisors didn't comply with  
5 that request, right?

6 A To my knowledge, they have not withdrawn the letters.

7 Q You do recall that the Debtor specifically asked the  
8 Defendants to file their lift stay motion so that they could  
9 finally resolve the issue of whether or not the Advisors and  
10 the Funds could actually terminate the agreement, right?

11 A I -- I'm sorry. Can you repeat that question, please?

12 Q Do you recall that the Funds and the Advisors informed the  
13 Debtor that they were going to initiate steps to terminate the  
14 CLO management agreements, including moving to lift the stay?

15 A I think they indicated that they were going to take steps,  
16 but it would be pursuant to what was permitted in the court.

17 Q And do you remember that the Debtor specifically asked the  
18 Defendants to do exactly that, to bring this matter to a  
19 conclusion, to file the motion so that the Court could resolve  
20 the issue of whether or not they had a right to terminate the  
21 agreement? You remember that, right?

22 MR. RUKAVINA: Objection, compound, Your Honor.

23 THE WITNESS: I can't --

24 THE COURT: I'm sorry.

25 MR. MORRIS: I can't recall.

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1 THE COURT: Was there an objection?

2 MR. RUKAVINA: Yes, Your Honor. That's four  
3 questions in one. That's compound.

4 MR. MORRIS: I'll rephrase, Your Honor.

5 THE COURT: Okay. And let me interject a minute.  
6 Mr. Post, you have this habit of not looking squarely at the  
7 camera but looking over to your right. And in a normal  
8 courtroom setting, that might be fine, but I have no way of  
9 knowing if some lawyer or some other person is -- you're  
10 looking at them and they're somehow instructing you. I would  
11 certainly hope that's not what's going on, but it just kind of  
12 leaves room for me to wonder when you're not looking squarely  
13 at the camera. So can you start looking squarely at the  
14 camera, please?

15 MR. RUKAVINA: Your Honor, I can explain that, and  
16 certainly there's no funny business going on. There are two  
17 cameras on Mr. Post. One is on a laptop. We're looking at  
18 the Court on the big camera. I'm sitting behind Mr. Post. So  
19 if the Court would prefer that Mr. Post look directly into the  
20 laptop, then that's what he'll do, or if the Court would  
21 prefer that he look into the big camera.

22 THE COURT: Okay. Well, I prefer he look into the  
23 big camera just because it --

24 MR. RUKAVINA: So keep looking there? Yeah.

25 THE COURT: No, no, no, no. Okay. I don't know what

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1 -- I thought -- okay. Do you see what I'm seeing? I don't  
2 know if you can see what I'm seeing.

3 MR. MORRIS: Yes.

4 THE COURT: I'm seeing the left side of his face.

5 THE WITNESS: I'm sorry. I'll just look at the  
6 laptop. Sorry. I was -- I was looking at who was speaking to  
7 me.

8 THE COURT: Okay. Well, I don't --

9 MR. MORRIS: Okay.

10 THE COURT: I don't know the setup, so it was  
11 confusing to me.

12 All right. This is better. Thank you.

13 THE WITNESS: Yeah. I apologize.

14 MR. RUKAVINA: We'll focus on the laptop, Judge.

15 BY MR. MORRIS:

16 Q All right. So the question, Mr. Post, is: You do recall  
17 that the Debtor specifically asked the Defendants to file  
18 their motion to lift the stay so that the issue could finally  
19 be resolved; isn't that right?

20 A I can't recall that specifically.

21 Q You believe that may be one of the options that the Debtor  
22 specifically proposed, right?

23 A It -- yes.

24 Q Okay. But the Defendants never filed their lift stay  
25 motion to terminate the agreements; isn't that right?



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1 A I don't believe so.

2 Q Right. So the Debtor filed its complaint and its request  
3 for the injunction, right?

4 A Correct.

5 Q As the CO -- as the CCO, you may have reviewed the  
6 Debtor's complaint and motion, but you can't recall, given all  
7 the documentation that's involved, right?

8 A Correct.

9 Q You can't recall any facts that the Debtor asserted in  
10 support of its motion; isn't that right?

11 A I can't recall specifically. Correct.

12 Q But the one thing you do know is that the Debtor's motion  
13 is based on its entitlement to transact business pursuant to  
14 their arrangement with the CLOs as collateral manager,  
15 correct?

16 A Yes.

17 Q Now, you heard that there was supposed to be an initial  
18 hearing on the Debtor's motion for a temporary restraining  
19 order against the Defendants, right?

20 A Correct.

21 Q But you don't believe the motion for the TRO got heard,  
22 and you presume it got resolved, right?

23 A I don't believe it was heard.

24 Q Okay. And you understand that there is a TRO in place  
25 now, pursuant to which the Advisors and the Funds are

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1 prevented from interfering with the Debtor's execution of its  
2 rights under the CLO management agreements, right?

3 A Correct.

4 Q Before the TRO was resolved, you weren't personally  
5 involved in the process of deciding what witnesses would be  
6 called and what exhibits would be offered into evidence; is  
7 that right?

8 A No.

9 MR. MORRIS: During the deposition, Your Honor,  
10 subject to correction from Mr. Rukavina, I believe that the  
11 Defendants and the Debtor reached the following two  
12 stipulations.

13 First, the Defendants and the Debtor stipulate that Mr.  
14 Post was not going to be called as a witness at the TRO  
15 hearing.

16 MR. RUKAVINA: That is correct.

17 MR. MORRIS: And second, the Defendants and the  
18 Debtor stipulate that the Defendants were not going to offer  
19 into evidence any exhibits other than those specifically  
20 listed on their witness and exhibit list.

21 MR. RUKAVINA: That being the witness and exhibit  
22 list filed before the TRO. That is correct.

23 MR. MORRIS: Okay.

24 BY MR. MORRIS:

25 Q Let's talk about Mr. Seery for a minute. You know who Mr.

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1 Seery is, correct?

2 A Correct.

3 Q You understand he's an independent director and the CEO of  
4 the Debtor, right?

5 A Correct.

6 Q And you also understand that his -- in his capacity as the  
7 Debtor's CEO, Mr. Seery is authorized to sell certain  
8 securities and assets that are owned by the CLOs, correct?

9 A Correct.

10 Q In your opinion as the CCO, the chief compliance officer  
11 of the Advisors and the Funds, Mr. Seery has the knowledge and  
12 experience to trade securities on behalf of the CLOs, correct?

13 A Correct.

14 Q But you don't believe that it's in the Funds' best  
15 interest for Mr. Seery to sell SKY and AVYA securities, right?

16 A Correct.

17 Q But even though you reached that decision about Mr. Seery,  
18 you have no knowledge as to whether Mr. Dondero ever traded  
19 either of those securities before he resigned from Highland;  
20 isn't that right?

21 A I saw some trades that were shown on the screen earlier.  
22 I don't think I recalled at the time I was asked on Friday.

23 Q As of the time -- as of Friday, you had no knowledge as to  
24 whether Mr. Dondero had traded in AVYA securities prior to his  
25 departure from Highland, correct?

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1 A Correct.

2 Q And before, before forming your view as the chief  
3 compliance officer that Mr. Seery's trading of AVYA was not in  
4 the best interest of the Funds, you made no effort to see if  
5 Mr. Dondero had sold the exact same securities Mr. Seery was  
6 selling, correct?

7 A Correct.

8 Q And the sole source of information that you relied upon to  
9 reach your opinion that the trades weren't in the best  
10 interest of the Funds is Jim Dondero and Joe Sowin, correct?

11 A I'm sorry. Can you repeat that? You kind of cut out at  
12 the beginning.

13 Q Sure. And please, any time that happens, let me know. We  
14 had some problems this morning.

15 The sole source of information that you relied upon to  
16 reach your opinion that the trades weren't in the best  
17 interest of the funds is Jim Dondero and Joe Sowin; isn't that  
18 correct?

19 A Correct. They're the investment professionals, yes.

20 Q And you have no understanding as to why Mr. Seery wanted  
21 to sell the AVYA and SKY securities, do you?

22 A I was told that -- I don't know why he wanted to sell them  
23 personally, correct.

24 Q Okay. In fact, before reaching your conclusion as the CCO  
25 that Mr. Seery's trades were not in the best interest of the

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1 Fund, you did not undertake any investigation of any kind to  
2 try to determine why Mr. Seery wanted to sell AVYA or SKY  
3 stock, correct?

4 A Correct. I didn't reach out to Mr. Seery.

5 Q All right. You believe that Mr. Dondero and Mr. Sowin's  
6 opinion that Mr. Seery's trades aren't in the Funds' best  
7 interest should be heard pursuant to the Advisers Act, right?

8 A Correct.

9 Q Specifically, Section 2000 -- 206 of the Advisers Act,  
10 right?

11 A Correct.

12 Q Have you ever read Section 206 of the Advisers Act?

13 A Yes.

14 Q Okay.

15 MR. MORRIS: Ms. Canty, can you please put up the  
16 demonstrative for Section 206 of the Advisers Act?

17 MR. RUKAVINA: Your Honor, the witness just asked me  
18 for water. Nothing more.

19 THE COURT: Okay.

20 MR. MORRIS: Yeah. No problem.

21 BY MR. MORRIS:

22 Q I've put on the screen Section 206 of the Advisers Act,  
23 Mr. Post. Can you please tell the Court what provision of 206  
24 you believe Mr. Seery allegedly breached when he sought to  
25 sell AVYA and SKY securities?

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1 A It would be Number 4.

2 Q Do you believe that Mr. Seery engaged in fraudulent,  
3 deceptive, or manipulative practices by trying to trade AVYA  
4 and SKY securities?

5 A The -- as collateral manager for the CLOs, they're  
6 supposed to maximize returns for the preference shares, which  
7 we didn't believe the sales reflected that, and so they  
8 weren't acting, --

9 THE COURT: Okay.

10 THE WITNESS: -- you know, pursuant to their duties  
11 --

12 THE COURT: Here I -- here I go --

13 THE WITNESS: -- under the collateral management --

14 THE COURT: Here I go again. Here you go again.

15 THE WITNESS: I'm sorry.

16 THE COURT: It really was a yes or no question. All  
17 right?

18 BY MR. MORRIS:

19 Q You're the -- you're the chief compliance officer, right?

20 A Yes.

21 Q And this is the provision in Section 4 that you cite to as  
22 the provision that Mr. Seery violated when he attempted to  
23 sell SKY and AVYA securities, correct?

24 A Yes.

25 Q Did Mr. Seery engage in an act, practice, or course of

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1 business which was fraudulent when he looked to sell those  
2 securities?

3 A No.

4 Q Do you believe that Mr. Seery engaged in an act, a  
5 practice, or a course of business which was deceptive when he  
6 went to sell the SKY and the AVYA securities?

7 A Yes.

8 Q Who did he deceive?

9 A The investors of the CLOs, --

10 Q How?

11 A -- the preference shareholders.

12 Q How?

13 A By selling securities that the preference shareholder  
14 investors believed had further upside to them.

15 Q Did he lie to them?

16 A I don't believe he talked to the investors.

17 Q But you're putting your reputation on the line here and  
18 you're swearing under oath that Mr. Seery deceptively tried to  
19 sell SKY and AVYA securities?

20 A I believe that based off of a review and discussion with  
21 counsel.

22 Q Do you think he was manipulative?

23 A No.

24 Q Did you -- did you check in with the SEC to tell them that  
25 you had a bad actor here?

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1 A No.

2 Q You first formed your view that the Debtor violated  
3 Section 206 of the Advisers Act after the sales started to  
4 occur in the CLOs, correct?

5 A Correct.

6 Q But you don't know when the sales actually started, right?

7 A I believe there were sales --

8 Q And I assume, since you were the chief compliance officer  
9 since 2015, you don't believe that Mr. Dondero's sale of AVYA  
10 stock was deceptive, right?

11 A You would have to ask Mr. Dondero that, but I believe he  
12 was selling for cash, cash needs for other funds.

13 MR. MORRIS: Okay. I move to strike. I'm asking him  
14 not --

15 THE COURT: Sustained.

16 BY MR. MORRIS:

17 Q I'm asking about you. I'm asking about you. You're the  
18 chief compliance officer, right?

19 A Yes.

20 Q And you don't believe that when Mr. Dondero sold AVYA  
21 stock that he was engaged in deceptive practices, do you?

22 A No.

23 Q And that's because you don't even know whether he sold  
24 AVYA stock; isn't that right?

25 A On Friday, I -- that is correct.



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1 Q In fact, the only reason you learned that Mr. Seery wanted  
2 to sell AVYA and SKY stock is because Mr. Dondero told you;  
3 isn't that right?

4 A I believe I was forwarded the email after -- after there  
5 was communications on the sales.

6 Q And that's the email where Mr. Dondero told Mr. Sargent  
7 that he had personal liability, correct?

8 A I -- I believe it was an email prior to that about were  
9 trades being requested and Mr. Dondero responding.

10 Q You're familiar with the email where Mr. Dondero  
11 interfered with Mr. Seery's trades?

12 A Yes.

13 Q Okay. And you're aware that Mr. Dondero told Mr. Sargent  
14 that he faced potential liability if he continued to follow  
15 Mr. Seery's instructions, correct?

16 A Correct. Based off of Mr. Dondero's view.

17 Q Notwithstanding all of that, in your capacity as the chief  
18 compliance officer, you don't believe it's ever appropriate  
19 for an investor to step in and impede transactions that have  
20 been authorized by the portfolio manager unless the contract  
21 permits the investor to step in; isn't that right?

22 A I believe -- I'm sorry, can you repeat that, please?  
23 There was a lot of question.

24 Q Sure. Sure. In your capacity as the chief compliance  
25 officer, you don't believe it's ever appropriate for an

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1 investor to step in and impede transactions that were  
2 authorized by the portfolio manager unless the contract  
3 permits the investor to do so; isn't that correct? Isn't that  
4 correct?

5 A Yes.

6 Q Okay. I know you're not a lawyer, but you are the chief  
7 compliance officer of the Funds; isn't that right?

8 A Correct.

9 Q And you can't point to anything in any contract that gives  
10 Mr. Dondero the right to step in and impede transactions that  
11 have been authorized by Mr. Seery; isn't that correct?

12 A He's entitled rights as preference shareholders for the --  
13 for the Funds that hold those preference shareholders. So,  
14 indirectly, he should be afforded those rights as portfolio  
15 manager for those Funds.

16 Q Sir, you can't point to anything in any contract that  
17 gives Mr. Dondero the right to step in and impede transactions  
18 that have been authorized by Mr. Seery; isn't that correct?

19 A Correct.

20 Q Okay. But yet you have never told Mr. Dondero that he  
21 should not interfere with Mr. Seery's trades; isn't that a  
22 fact?

23 A Correct.

24 Q In fact, you never personally took any steps at any time  
25 to make sure that there would be no further interference with

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1 the Debtor's trading activities; isn't that correct?

2 A Correct.

3 Q And that's because you believe, as the chief compliance  
4 officer of the Funds, that Mr. Dondero should have the leeway  
5 to make the determination as to whether or not the  
6 transactions are appropriate; isn't that correct?

7 A He should be able to be heard in the transactions that are  
8 being made, correct.

9 Q Sir, not to be heard, but to make the determination. Let  
10 me ask the question again. You believe, as the CO -- CCO of  
11 the Funds, that Mr. Dondero should have the leeway to make the  
12 determination as to whether or not the transactions are  
13 appropriate; isn't that correct?

14 A Yes.

15 Q Okay. And you completely deferred to Mr. Dondero; isn't  
16 that right?

17 A For the investment determination, yes.

18 Q And based on that deference, you never took any steps at  
19 any time to make sure no one on behalf of the Advisors or the  
20 Funds impeded or stopped transactions authorized by Mr. Seery,  
21 correct?

22 A Correct.

23 Q You understand there's a TRO in place today that prevents  
24 Mr. Dondero and the Advisors and the Funds from interfering  
25 with Mr. Seery's trading activities; isn't that right?

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1 MR. RUKAVINA: I'm going to object to that, Your  
2 Honor, to the extent that calls for a legal conclusion. And I  
3 do think it mischaracterizes the testimony. I'm sorry. The  
4 TRO.

5 THE COURT: Overruled.

6 BY MR. MORRIS:

7 Q You can answer, sir. Would you like me to repeat the  
8 question?

9 A Yes, please.

10 Q You understand that there is a TRO in place -- TRO in  
11 place today that prevents Mr. Dondero, the Advisors, and the  
12 Funds from interfering with Mr. Seery's trading activities on  
13 behalf of the CLOs, correct?

14 A Correct.

15 Q But in the absence of the TRO, in your view, whether you  
16 tell Mr. Dondero not to interfere with Mr. Seery's trades  
17 depends on the facts and circumstances that exist at the time,  
18 right?

19 A Correct. From a -- yes.

20 Q Okay. And up until this point, there have been no facts  
21 and circumstances that have caused you to tell Mr. Dondero not  
22 to interfere with Mr. Seery's trades on behalf of the CLOs,  
23 correct?

24 A He can't because of the TRO.

25 Q Correct. But if the TRO wasn't in place, it's possible

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1 that you wouldn't take any steps to stop Mr. Dondero from  
2 impeding Mr. Seery's trades; isn't that right?

3 A I mean, if Mr. Dondero or other investment professionals  
4 have a view, that they should be -- they should have a right  
5 to be heard as preference shareholders of the CLOs.

6 Q Okay. But if the TRO wasn't in place, you wouldn't act to  
7 stop Mr. Dondero from interfering or impeding the Debtor's  
8 trades on behalf of the CLO; isn't that right?

9 A He would -- if he would be permitted to talk to Mr. Seery.

10 Q Okay. Prior to the imposition of the TRO, you took no  
11 steps to stop Mr. Dondero from interfering with Mr. Seery's  
12 trades, correct?

13 A Correct.

14 Q And if the TRO wasn't in place, it's possible you wouldn't  
15 take any steps to stop Mr. Dondero from impeding -- impeding  
16 Mr. Seery's trades again; isn't that right?

17 A If there's an investment rationale as to why they feel the  
18 trades shouldn't be done, I -- again, I feel like Mr. Dondero  
19 or the other investment professionals should be able to raise  
20 those points with Mr. Seery.

21 Q Do you think they should be able to stop the trades?

22 A I -- I -- I think they should be able to question the  
23 trades. But flat-out stop them, I'd probably say no.

24 Q Then why didn't you do anything before the TRO was  
25 entered?

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1 A Um, I'm sorry, can you repeat the -- do anything in -- in  
2 what manner?

3 Q Why didn't you take any steps before the TRO was entered  
4 to stop Mr. Dondero from interfering and stopping and impeding  
5 the Debtor's trades?

6 A I think, as I recall, there was only one -- one set of  
7 trades in question that he stepped in on.

8 Q So, one is okay? How about two?

9 A Or, sorry. There were two trades on one day that -- that,  
10 you know, he questioned. Or stepped in on. I don't -- I  
11 don't recall him stopping any other trades thereafter.

12 Q That's all you know about, right?

13 A Correct.

14 Q And with that knowledge, it never occurred to you to tell  
15 Mr. Dondero to knock it off, did it?

16 A He believed the trades weren't in the best interest for  
17 the investors, so I did not.

18 Q And that's what you mean by deferring to him; isn't that  
19 right?

20 A From the investment perspective, yes.

21 Q Thank you for your -- thank you for your honesty. As the  
22 CCO, you have never communicated with the Issuers about the  
23 Debtor's performance under the CLO management agreements;  
24 isn't that right?

25 A Correct.

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1 Q And that's because you didn't believe it was in your  
2 responsibility as the CCO to check with the Issuers to see if  
3 the Issuers believed that the Debtor was in compliance with  
4 the CLO management agreements, correct?

5 A That communication would have involved counsel and that  
6 communication didn't occur. I wouldn't have reached out to  
7 them directly.

8 Q Yeah. You didn't believe it was within your  
9 responsibility as the chief compliance officer to communicate  
10 with the Issuers to see if they had any views as to Mr.  
11 Seery's performance as portfolio manager, correct?

12 A Correct, because it would have involved me working with  
13 counsel and there was never direction to do that.

14 Q As the chief compliance officer of the Defendants, you  
15 have no idea if anyone on behalf of the Advisors or the Funds  
16 ever asked the Issuers whether they believed the Debtor was in  
17 default under the CLO management agreements, correct?

18 A Correct.

19 Q As the CCO, you have no idea if anyone on behalf of the  
20 Advisors or the Funds ever asked the Issuers whether they  
21 believed was in breach under the CLO management agreements,  
22 correct?

23 A Correct. I believe there was a call that I wasn't a part  
24 of, that it was just involving lawyers, that I don't know what  
25 was discussed on the call. So, correct.

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1 Q As the CCO, you have no idea if anyone on behalf of the  
2 Advisors or Funds ever asked the Issuers whether they believed  
3 it was appropriate to try to take steps to terminate the CLO  
4 management agreements; isn't that right?

5 A Correct.

6 Q None of the Issuers joined any of the letters that were  
7 sent on behalf of the Funds and the Advisors, right?

8 A I didn't -- I don't recall seeing their names listed.

9 Q As the CCO, you don't have any understanding as to what  
10 the standard is for terminating the CLO management agreements  
11 unless you get legal advice; isn't that right?

12 A Yes. It was -- it would be a discussion with counsel,  
13 given the complexity of the agreements.

14 Q But as a factual matter, you're not aware of any facts  
15 that would support the termination of the CLO management  
16 agreements except that there were trades that Mr. Dondero  
17 didn't think were in the best interests of the Funds; isn't  
18 that right?

19 A Yes. And because the belief was those trades weren't  
20 maximizing value for the preference shareholders.

21 MR. MORRIS: I move to strike everything after the  
22 word yes, Your Honor.

23 THE COURT: Granted.

24 MR. MORRIS: I have no further questions.

25 THE COURT: All right. Mr. Rukavina?



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1 MR. RUKAVINA: Your Honor, I'll reserve my questions  
2 for my case in chief.

3 THE COURT: All right. Mr. Post, that concludes your  
4 testimony for now. Stick around.

5 Mr. Morris?

6 MR. MORRIS: Your Honor, last witness, and I hope  
7 it's rather brief, actually. The Debtor calls James Seery.

8 MR. RUKAVINA: Your Honor, may we have a brief  
9 restroom break, all of us in this room, before we start the  
10 next witness?

11 THE COURT: All right. We'll take a five-minute  
12 restroom break. I know part of the long day is because of my  
13 commitment at the lunch hour, but you all did estimate three  
14 or four hours for this hearing, right? That's what I recall.

15 MR. MORRIS: We did.

16 MR. RUKAVINA: Your Honor, I was never consulted on a  
17 time estimate. I had no idea that someone said three to four  
18 hours.

19 THE COURT: All right.

20 MR. MORRIS: And part -- part of that is my fault and  
21 the technological problems we had this morning, so I take  
22 responsibility for that, Your Honor, and I sincerely  
23 apologize.

24 THE COURT: Okay. Well, just so you know, we cannot  
25 come back tomorrow. I've got two -- too booked today tomorrow

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1 to come back, so --

2 MR. MORRIS: I don't expect Mr. Seery to be more than  
3 about 15 minutes.

4 THE COURT: Okay. We'll take a five-minute break.

5 THE CLERK: All rise.

6 (A recess ensued from 3:22 p.m. until 3:32 p.m.)

7 THE CLERK: All rise.

8 THE COURT: All right. Please be seated. I wanted  
9 to clarify one thing I said, just so no one is confused. I  
10 know that originally you had today, Wednesday, and Thursday,  
11 26th, 27th, and 28th, for confirmation. So if anyone thought,  
12 oh, we're coming back tomorrow on this if we don't finish,  
13 because originally you had all three of those days, you know,  
14 as soon as we continued the confirmation hearing, we started  
15 filling in Wednesday. So we have three different Chapter 11  
16 case matters set tomorrow. And so it was, you know, you give  
17 up time and we have people usually wanting to get that time,  
18 so that's what happened.

19 But anyway, people, we'll talk fast and we'll get it done  
20 today, right?

21 MR. RUKAVINA: Your Honor, my -- Your Honor? Oh,  
22 wait. I need to --

23 THE COURT: Ooh, it sounds like you're in a cave.  
24 Let's get those headphones on.

25 MR. MORRIS: I promise to be as quick as I can, Your

1 Honor.

2 THE COURT: Okay. Mr. Rukavina, were you trying to  
3 say something?

4 MR. RUKAVINA: I was, Your Honor. Can you hear me?

5 THE COURT: Yes.

6 MR. RUKAVINA: This darn video. Too many -- Your  
7 Honor, we have an agreed TRO that goes through February the  
8 15th. And I'm certainly not suggesting taking any more of the  
9 Court's time than is necessary, but I cannot commit to  
10 finishing today, especially because Mr. Morris has taken so  
11 much time. So I think we will do our best, but I just want  
12 the Court to know that there's no urgency to this, and if we  
13 have to come back at some point after Tuesday or Wednesday,  
14 there's no possible harm to the Debtor.

15 MR. MORRIS: Your Honor, it's my hope that we can get  
16 this done, and I think the sooner we begin the better.

17 THE COURT: Okay. Well, we're going to try to get it  
18 done. All right, Mr. Seery. You've called Mr. Seery to the  
19 stand now?

20 MR. MORRIS: Yes, Your Honor. The Debtor calls James  
21 Seery.

22 THE COURT: All right. Mr. Seery, please raise your  
23 right hand.

24 JAMES P. SEERY, DEBTOR'S WITNESS, SWORN

25 THE COURT: All right. Thank you.

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1 MR. MORRIS: May I proceed?

2 THE COURT: You may.

3 MR. MORRIS: Thank you, Your Honor.

4 DIRECT EXAMINATION

5 BY MR. MORRIS:

6 Q Good afternoon, Mr. Seery. Can you hear me okay?

7 A I can, yes.

8 Q Okay. Let's just cut to the chase here. You're the CEO  
9 of the Debtor; is that right?

10 A That's correct.

11 Q And in that capacity, do you understand that the Debtor is  
12 party to contracts pursuant to which it manages certain CLO  
13 assets?

14 A Yes.

15 Q And are you personally involved in the management of those  
16 assets?

17 A Yes.

18 Q Do you have any prior experience managing other people's  
19 money or other people's assets?

20 A Yes.

21 Q Can you please explain to the Court your experience and  
22 your knowledge as to investing other people's money?

23 A Yes. I was a finance lawyer -- I'll go quickly, if it's  
24 okay. I can fill in later, if you like. I was a finance and  
25 bankruptcy lawyer for ten years before I went to Lehman on the

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1 business side in 1999.

2 In that role, I started immediately in distressed  
3 investing. I worked as part of a team of analysts and traders  
4 to build distressed positions in prop (phonetic) business,  
5 trading Lehman Brothers balance sheet at the time. This was  
6 in 1999 and 2000. We were one of the most significant  
7 investors on the Street, and I was part of that team, and a  
8 leading part of the team, putting on significant investments  
9 of our balance sheet, which was Lehman's money, into different  
10 kinds of stressed, distressed, high yield investments. That  
11 included bonds, that included loans, unsecured, subordinated.  
12 Sometimes equity. Typically, we stayed in credit, but a lot  
13 of this was very distressed credit, which often ended up as  
14 reorg equity.

15 After that, I began running different teams for making  
16 distressed loans to companies that no one else would lend  
17 money to. These investments were significant, anywhere from  
18 fifty to a billion dollars. Some of the largest transactions  
19 in the world at the time were transactions I ran, like a  
20 rescue loan to PG&E for a billion dollars. That was in 2000.

21 After that, I continued to grow my career there, running  
22 distressed investments. In 2005, I took over the loan  
23 business at Lehman. That included all high-grade loans, high-  
24 yield loans, trading and sales of those loans; managing that  
25 portfolio, which was in excess of \$10 or \$20 billion,

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1 depending on the time; exposure both in committed transactions  
2 as well as funded loans; the hedging of that portfolio;  
3 traders and salespeople working for me. In addition, I had  
4 significant responsibility for the distressed book, as well as  
5 all restructuring business at Lehman.

6 After Lehman, I -- and I was one of the people who sold  
7 Lehman -- I became a senior investing partner at RiverBirch  
8 Capital. We were about a billion and a half dollar long/short  
9 investor, mostly stressed and distressed, but a lot of high-  
10 grade trades as well, particularly in preferred stocks. That  
11 was a global business, but primarily U.S., Europe, some Asian  
12 investments as well.

13 Since then, I've gotten to Highland. I've been  
14 responsible for Highland's investments. After the first  
15 quarter, when the performance managed by Mr. Dondero was  
16 absolutely disastrous -- we lost about \$80 million in equity  
17 securities, positions that he managed, about \$50 million in  
18 the Select Equity Fund, and about \$30 million in the -- in the  
19 Highland internal account. After Jefferies seized the Select  
20 account, I took over the --

21 A VOICE: I think Mr. Seery has sort of gone beyond  
22 the question of his background.

23 THE WITNESS: He's asked me if I was experienced in  
24 investing other people's money. I was giving that background.  
25 But we -- I can stop or I can keep going, if you like.

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1 THE COURT: Okay. If that was an objection, --

2 MR. MORRIS: Let's --

3 THE COURT: -- I overrule it. Go ahead.

4 THE WITNESS: I've been managing that portfolio. In  
5 addition, after Mr. Dondero left, but I actually started  
6 looking at it before that, started taking over the CLO  
7 portfolio, or taking a look at it, frankly. We have a -- we  
8 have an experienced professional sitting on top of it, Hunter  
9 Covitz, who manages the day-to-day exposure. But those  
10 portfolios -- we call them CLOs, Your Honor, but I think  
11 you've heard testimony before, they're not really. Acis 7 is  
12 a CLO. The 1.0 CLOs are very old investment vehicles that are  
13 primarily structured as, right now, closed-end investment  
14 funds. They don't have the typical diverse portfolio of loans  
15 that a CLO has. They have mostly reorg equity or positions in  
16 real estate and in MGM. So the -- the securities we've been  
17 talking about in these trades are publicly-traded liquid  
18 securities that Highland took as post-reorganization equity.

19 Q Thank you, Mr. Seery. Let's cut to the chase on the AVYA  
20 and the SKY. Nobody seems to have asked you this question,  
21 but did you -- have you looked to sell AVYA and SKY securities  
22 since the time that Mr. Dondero left in October?

23 A I have, yes.

24 Q Can you please explain to the Court your investment  
25 rationale, the reason why you wanted to sell -- let's just

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1 take them one at a time. Let's start with AVYA. In the last  
2 couple of months, why have you wanted to sell AVYA?

3 A Well, the original impetus to sell AVYA came from Mr.  
4 Covitz when it started moving up as a post-reorg security in  
5 the communications space that had -- had really performed  
6 extremely poorly post its Chapter 11. Mr. Covitz over the  
7 summer felt we should start lightening up on that position. I  
8 agreed. He did that. And Mr. Dondero eventually cut him off.

9 As it got to the fall, what I did was I got Mr. Covitz, as  
10 well as then the analyst -- the analyst on that is Kunal  
11 Sachdev. That's the Highland analyst on the position -- as  
12 well as Joe Sowin and Matthew Gray, who's another senior  
13 analyst. And I looked at all of the equity positions in the  
14 CLOs and wondered why we had them. What was the view? Were  
15 they worth keeping?

16 Primarily, the ones we looked at were four of the post-  
17 reorg equities that were liquid. A company called Vistra, a  
18 company called Arch Coal. Vistra is the old TXU, a well-known  
19 bankruptcy. Arch Coal, another well-known bankruptcy. Avaya,  
20 a bankruptcy; and Sky Champion, a less -- less-known  
21 bankruptcy but came out of there.

22 Mr. Gray is the analyst on Vistra and Arch. We  
23 determined, based upon his recommendations, not to sell those.  
24 Mr. Sachdev was the analyst on Avaya, and he believed that it  
25 had reached its peak, and even though it could continue to go



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1 up or down -- stocks often do that -- he did not think that  
2 the value was there. His recommendation was to sell.

3 Mr. Sowin was in those meetings. Prior testimony to the  
4 contrary or any statements that were said before are  
5 completely false, they're completely made up, so I know it's  
6 frustrating and I apologize for -- for being frustrated.

7 So we decided that we would sell the Sky Champion. A  
8 pretty simple answer. Highland didn't have an analyst.  
9 Literally didn't have an analyst. Nobody had a view as to  
10 what the stock was. It just sat in there, in two CLOs,  
11 without anybody paying any attention to it.

12 I had Matthew Gray take a look. He felt that it was at  
13 fair value. I did my own work on it, felt it was at fair  
14 value, notwithstanding some good tailwinds in -- secular  
15 tailwinds in the home building space, and determined that that  
16 CLO should sell those securities.

17 Q Thank you, sir. Prior to his departure at Highland, did  
18 Mr. Dondero have responsibility over the management of any of  
19 the CLO assets?

20 A He did, yes.

21 Q And do you understand, do you know whether Mr. Dondero  
22 sold AVYA securities on behalf of the CLOs and on behalf of  
23 the Funds during the time that he was employed as the  
24 portfolio manager from January until October 2020?

25 A I do. And he did sell those securities. The chart you

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1 put up, based upon our business record, is accurate, and he  
2 engaged in significant sales of those securities throughout  
3 the year.

4 Q Okay.

5 MR. MORRIS: Can we please put upon Demonstrative #1?

6 BY MR. MORRIS:

7 Q Okay. And can you just explain to the Court what this  
8 document is?

9 A It's a trade report, one of Highland's -- this shows the  
10 whole platform, so it's the aggregate sales. The name of the  
11 email -- I apologize, I forgot the system; it just left my  
12 mind. But the email you saw before is anybody on the platform  
13 used for various trades if they're part of a trading group.  
14 And that's to make sure that, across the portfolio, in its  
15 corporate platform, you aren't running into either compliance  
16 problems or allocation problems that could lead to a  
17 compliance problem.

18 Q So this shows sales of Avaya on these particular dates.  
19 The trade is -- the trade symbol is AVYA. This is a liquid  
20 security. Trades in, you know, liquid equity markets. I  
21 believe its average trading volume is somewhere about a  
22 million and a half a day, approximately. So you have a trade  
23 date. You have the type of transaction. It could be a buy or  
24 a sell. These are all sales. The quantity. And then the  
25 price. And then it would have the Fund, and then the

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1 aggregate dollars, which is simply multiplying the price times  
2 the quantity.

3 Q And if we just scroll down to the end of the document,  
4 October 9th, is that around the time that Mr. Dondero left  
5 Highland?

6 A Right around that time. This was coming into a number of  
7 hearings that we thought it was most important to have Mr.  
8 Dondero depart, particularly in light of some of the positions  
9 that he and his companies were taking vis-à-vis the Debtor.

10 MR. MORRIS: Can we put up Demonstrative Exhibit #2,  
11 please?

12 BY MR. MORRIS:

13 Q Can you explain to the Court what this is?

14 A Uh, --

15 MR. MORRIS: And again, just for -- just for the  
16 record -- sorry to interrupt, Mr. Seery -- the backup for this  
17 information can be found at Debtor's Exhibits BBBBB to SSSSS

18 BY MR. MORRIS:

19 Q Go ahead, sir. Could you explain to the Court what this  
20 is?

21 A Yeah. This is just a pretty straightforward chart showing  
22 the bars being sales and the lines being the -- the closing  
23 sale price of a buy on that day. And so you can see, you  
24 know, with the market fallout in the early part of the year,  
25 AVYA hit a low, but like most of the securities in the market,

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1 it has come back very strongly. And you see Mr. Dondero's  
2 trades earlier in the year, the rest of it during the middle  
3 part of the year, sales in the third quarter, and then, when  
4 he's gone, I began selling in November and December.

5 Q Now, so is it fair to say that Mr. Dondero and the  
6 Defendants didn't completely impede and stop the Debtor from  
7 selling AVYA shares?

8 A That's fair. What -- there's a little bit of confusion.  
9 The way the trading desk worked previously is that you have  
10 these separate companies but they're not really separate  
11 companies. HCFMA is populated by about seven employees. Many  
12 of them have functions across a number of different companies.  
13 HCFMA exists solely because Highland funds it. They haven't  
14 paid fees of about three million bucks this year. They owe  
15 \$10 million related to a disastrous bailout of what was an  
16 open-end fund called Global AI a couple years ago where the  
17 SEC, you know, came in and took significant action, almost  
18 shut significant parts of Highland down. And these traders do  
19 the trading of all the equities across the platform.

20 So I typically would call them, and this is how we worked  
21 in the spring when I took over the internal account after the  
22 seizure by Jefferies of Mr. Dondero's management of the Select  
23 Equity account. I would work with Joe Sowin as the trader,  
24 make decisions on what we wanted to do for the day, he would  
25 execute those trades by going out in the market with a broker,

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1 selling them to -- to the dealer on the other side, run it  
2 through our automated system, and then the trades get closed  
3 with the back office.

4 So there's the trade, which is your agreement to buy or  
5 sell at a particular dollar price. That gets inputted into  
6 the OMS system, and then from there it's the back office takes  
7 over, and then ultimately securities are delivered versus  
8 payment to the counterparty.

9 Q Okay. And can you just describe, you know, in one or two  
10 sentences, your interpretation of this chart and how your  
11 sales and the green bars compare to Mr. Dondero's sales and  
12 the brown bars?

13 A Well, the two simple obvious answers are, one, they're  
14 smaller, and two, they're at higher prices.

15 Q Okay. You also traded, since Mr. Dondero's departure,  
16 securities known as SKY; is that right?

17 A That's correct. It's Sky Champion Corp. The ticker is  
18 SKY.

19 Q And did Mr. -- to the best of your knowledge, Dr. Mr.  
20 Dondero trade in SKY securities prior to his departure?

21 A I don't believe so. As I said earlier, we didn't appear  
22 to have an analyst on that for some time. I don't even know  
23 how far back it goes. It was a bit of an orphan security  
24 sitting in the portfolio. It's only -- it was only in two of  
25 the CLOs.

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1 Q Okay.

2 MR. MORRIS: Can we please put up Demonstrative #3,  
3 please? Okay.

4 BY MR. MORRIS:

5 Q And can you just explain to the judge what's depicted on  
6 this page?

7 A Again, similar to the last chart, you have the dollar  
8 price of the security at the close each day, throughout the  
9 year, and then the green bar showing where we began to sell  
10 securities for those CLOs.

11 Q And so, again, is it fair to say that Mr. Dondero and the  
12 Defendants haven't completely stopped the Debtor from engaging  
13 in SKY transactions?

14 A That's correct. What we did was the so-called workaround  
15 previously mentioned, was that we decided that I would have to  
16 do the trading directly. So I'd literally look at the stock  
17 each day, talk to the broker at Jefferies, determine what  
18 level to sell at, communicate with him throughout the day,  
19 work through transactions. Then he reports in whether he's  
20 been able to sell and execute on our behalf. When he's done  
21 that, then we have the back office manually enter the trades,  
22 as opposed to doing it from the automated trading desk, and  
23 then have those trades close. So, so far, knock on wood, we  
24 haven't failed on any trades.

25 Q Okay.

Seery - Direct

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1 MR. MORRIS: We can the demonstrative down, please.

2 BY MR. MORRIS:

3 Q Just two more topics here, sir. Can we talk briefly about  
4 what efforts, if any, the Debtors have made to avoid this  
5 litigation? I'll just ask them one at a time. Has the Debtor  
6 made any attempt to transfer the CLO management agreements to  
7 the Defendants or to others?

8 A Well, our original construct of our plan was to do that.  
9 We've since determined, when we tried to do that, we got  
10 virtually no response from the Dondero interests. The  
11 structure of the original thought of the plan was if we didn't  
12 get a grand bargain we would effectively transition a  
13 significant part of the business to Dondero entities, they  
14 would assume employee responsibilities and the operations, and  
15 then assure that the third-party funds were not impacted.

16 As I think I testified on the -- I can't recall if it was  
17 the deposition or my prior testimony in court -- Mr. Dondero,  
18 true to his word, told me that would be very difficult, he  
19 would not agree, and he has made that very difficult.

20 So we examined it. We've determined that we're going to  
21 maintain the CLOs and assume them. But we originally tried to  
22 contemplate a way to assign those management agreements.

23 We've had --

24 Q All right.

25 A -- significant discussions with the CLO Issuers, and

Seery - Direct

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1 they're supportive of us retaining them.

2 Q Okay. You were on the -- you've been participating or  
3 listening in to the hearing throughout the day; is that right?

4 A I have, yes. I apologize. I didn't leave the screen on  
5 because I didn't want to suck up bandwidth.

6 Q Are you familiar with all of the K&L Gates letters that  
7 that were reviewed today?

8 A I am, yes.

9 Q Did the Debtor request that the Defendants withdraw those  
10 letters?

11 A Yes, we did.

12 Q Had the Defendants withdrawn those letters, might that  
13 have avoided this whole litigation?

14 A I think it would have. What we wanted to have here is a  
15 withdrawal of the letters and an agreement by the clients for  
16 the -- the K&L Gates clients that they wouldn't interfere with  
17 the operations of the Debtor and our drive towards a plan.  
18 They could take their legal positions and object to the plan,  
19 if they like, but interfering on a day-to-day basis was  
20 unacceptable to us in terms of trying to operate this business  
21 in the most efficient manner.

22 We specifically requested that they do that. This is, I  
23 don't think, lost on anybody, certainly not on me in my  
24 experience here for years: These entities are all dominated  
25 and controlled by Mr. Dondero, and each of these attacks is



Seery - Direct

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1 specifically coordinated for the purpose of diverting the  
2 Debtor, causing confusion, and forcing us to spend estate  
3 resources.

4 Q Do you know if the Debtor also asked the Defendants to  
5 avoid this whole injunction proceeding by simply filing their  
6 motion to lift the stay and see if they could actually win a  
7 motion to terminate the contract?

8 A Well, what we did was we contemplated the best, most  
9 efficient way out, and it was either withdrawing the  
10 agreement; if they didn't agree, then we'd said you should  
11 file your stay motion immediately and let's have this  
12 determined. We told them, short of that, if they weren't  
13 willing to do that, then we would have to put this in front of  
14 the Court to try to make sure that we could operate the  
15 business.

16 Q All right. So, just to summarize, you attempted to sell  
17 the CLO management agreements, but were unable to do so; is  
18 that right?

19 A I would say assign. We would have looked for a payment,  
20 there is a cure payment that we have to make, but we didn't  
21 we didn't conduct an auction for the CLO assets.

22 Q And to the best of your knowledge, the Defendants never  
23 withdrew the letters; is that right?

24 A They did not.

25 Q And to the best of your knowledge, the Debtors -- the

Seery - Direct

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1 Defendants never brought their contemplated lift stay motion,  
2 right?

3 A They have not, no.

4 Q And so why did the Debtor bring this action?

5 A Well, quite clearly, to try to prevent the managers and  
6 Mr. Dondero and the Funds from interfering with the way that  
7 we operate the business. We intend to continue to manage the  
8 CLOs, we intend to assume those contracts, we intend to manage  
9 them post-confirmation, after exit from bankruptcy. And  
10 causing confusion among the employees, preventing the Debtor  
11 from consummating trades in the ordinary course, deferring  
12 those transactions, we thought put the estate at significant  
13 risk, in addition to the cost.

14 Q Did you hear Mr. Rukavina in the opening suggest that  
15 these might, in fact, be money-losing contracts?

16 A I did, yes.

17 Q Why would the Debtor want to assume money-losing  
18 contracts?

19 A They're not money losing contracts.

20 Q And why, why do you say that?

21 A They generate fee income. So the fees on each of these  
22 CLOs get paid to the Debtor. Now, not all of these CLOs, as I  
23 mentioned earlier, are -- none of them are ordinary CLOs,  
24 other than Acis 7. But not all -- because they don't all have  
25 liquid assets that are able to pay their fees each quarter,

Seery - Direct

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1 some are deferred. There are some CLOs that will probably  
2 never pay any deferred fee because they are underwater. Those  
3 are not CLOs that Mr. Dondero or the Funds own any of. That's  
4 not really a surprise. But we will continue to manage those  
5 and look for ways to exit for those investors who are  
6 noteholders who are underwater in those CLOs.

7 Q Okay. Can you describe for the Court the Debtor's  
8 contentions as to how the conduct that has been adduced  
9 through today's evidence, how is the Debtor harmed by Mr.  
10 Dondero's interference in the trades and the sending of these  
11 letters?

12 A I think it's clear in terms of operational risk. Being  
13 forced to construct a workaround to consummate trades that we  
14 think are in the best interest of the Funds.

15 It's telling not only that neither Mr. Dondero nor Mr.  
16 Sowin nor -- Mr. Sowin was on the calls and agreed to the  
17 analyst view, by the way -- nor anybody from MHF ever asked me  
18 a question, their lawyers in the deposition never asked me why  
19 we were selling these securities. They simply want to get in  
20 the way, cause additional risk to the estate, and cause  
21 additional exposure with respect to legal fees, divert our  
22 attention from trying to consummate the case. I think that's,  
23 in my opinion, that's pretty clear.

24 Q Is there any concern on the part of the Debtor that  
25 that Mr. Dondero's emails and conduct is creating uncertainty

Seery - Direct

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1 among the staff as to who's in charge?

2 A I think they did initially, and if they continued, they  
3 would. Right now, the workaround is working pretty well. We  
4 still do keep Mr. Sowin on the emails to make sure that, you  
5 know, from a compliance perspective, that our sales, he knows  
6 about; that we're not stepping on each other's markets, if you  
7 will; that we're not getting in the way that -- in the way if  
8 he wants to sell assets from a different MHF other managed  
9 asset holding, but we do have a workaround that works right  
10 now.

11 I think the biggest risk is, because it's much more  
12 manual, you have risk of so-called fat-finger trades, where  
13 you think you're selling a thousand and you sell 10,000, you  
14 think you're executing a sale and you're executing a buy, you  
15 think you're executing from an account that has the securities  
16 and end up selling short from an account that doesn't. So  
17 we've got to be very careful of that, but the team is doing  
18 that now. There certainly was confusion at the start.

19 Q And can you just explain to the Court your view as to how  
20 the Debtor is able to -- how the Debtor will be able to  
21 service the contract on a go-forward basis?

22 A The CLO contracts?

23 Q Yes.

24 A We'll have a team of folks able to manage these assets  
25 with professionals that are experienced credit analysts,

Seery - Direct

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1 equity analysts. I think we'll be able to manage this --  
2 these assets in a pretty straightforward manner. It's not  
3 going to be very difficult.

4 Q Has the Debtor been harmed through the diversion of your  
5 personal attention as CEO in responding to all of this?

6 A I like to think that I can juggle a lot of different  
7 things. I would prefer not to have to be looking at the  
8 securities levels each day and feeding out securities that we  
9 determine to sell through the broker at Jefferies, who,  
10 notwithstanding, is doing a great job. It's the job of the  
11 trader to actually do that and day-to-day -- throughout the  
12 day monitor the markets and look for the best place to sell.

13 So do I think I'm getting the best execution? I think the  
14 trader at Jefferies is excellent. Do I think if a trader on  
15 the Highland side was involved every step of the way, I think  
16 it would be better.

17 Q Have the Debtor's professionals' attention and resources  
18 been diverted to deal with all of this stuff?

19 A That -- I think that's -- that's quite clear as well.  
20 It's a significant expense.

21 Q Okay.

22 MR. MORRIS: Your Honor, I have no further questions  
23 of this witness.

24 THE COURT: All right. Mr. Rukavina?

25 MR. HOGEWOOD: Your Honor, if you please, Lee

Seery - Cross

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1 Hogewood from North Carolina. You've admitted me *pro hac*  
2 *vice*. If I may do cross-examination, I would appreciate it.

3 THE COURT: All right. Go ahead.

4 MR. HOGEWOOD: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. HOGEWOOD:

7 Q Mr. Seery, let me ask you about the letters that came from  
8 our firm, and especially from me, beginning on December 22nd.  
9 I think you spoke about those generally. If you need them to  
10 be called up, I think my questions will be crisp as to the  
11 letters generally, but we could certainly look at them  
12 specifically, if need be.

13 There was initially a letter dated December 22nd, 2020,  
14 that's Debtor's Exhibit DDDD, at Docket 39. I take it you've  
15 read that letter?

16 A I have, yes.

17 Q And it's fair to say that was a request you had seen  
18 before?

19 A I don't think that's fair to say, no.

20 Q You had not seen a request to discontinue trades until the  
21 confirmation hearing?

22 A I don't believe so, no.

23 Q Okay. So that, that was the first time a request had been  
24 made not to trade in the CLO securities prior to confirmation?

25 MR. MORRIS: Objection to the form of the question.

Seery - Cross

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1 THE COURT: Overruled.

2 THE WITNESS: I --

3 THE COURT: Go ahead. You can answer.

4 THE WITNESS: I don't recall you sending me a letter  
5 before that, but I -- if you have, then I apologize. I  
6 thought I was pretty familiar with them, but I don't recall  
7 you sending me that request previously.

8 BY MR. HOGEWOOD:

9 Q Okay. I'm sorry. That was the first request you had  
10 received from me, is that -- that's correct?

11 A Yes.

12 Q But there had been prior requests of a similar nature?

13 A Not to my recollection. Is there a letter?

14 Q All right. Well, let me -- let me move on. You  
15 weren't intimidated by my letter, were you?

16 A Was I intimidated by your letter? No, I was not  
17 intimidated.

18 Q And it didn't cause -- the letter itself did not cause you  
19 or the Debtor to alter your investment strategy?

20 A It did not, no.

21 Q And it did not cause you or the Debtor to refrain from  
22 operating the company in the manner that you perceived to be  
23 in its best interest?

24 A It did not.

25 Q It did not cause you to change any of your trading

Seery - Cross

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1 decisions?

2 A No.

3 Q You and your counsel responded -- or, your counsel  
4 responded to the letter a couple of days later; isn't that  
5 correct?

6 A Yes.

7 Q And the response rejected the request that had been made  
8 and demanded that the letter be withdrawn; is that right?

9 A Yes.

10 Q So the range of communication is a set of lawyers  
11 representing adverse parties asserting their respective  
12 positions? Is that a fair characterization of that set of  
13 communications?

14 A No.

15 Q Okay. Would you characterize it differently?

16 A Yes.

17 Q All right. How so?

18 A I believe you sent a letter with no good-faith basis,  
19 knowing what the contracts say as an experienced lawyer,  
20 knowing there was not cause, yet still making the same  
21 threats, basically couching them as a request. But I don't  
22 think there was any good-faith exchange of ideas. No one even  
23 asked me why I was making the trades. I think you were aware  
24 of that.

25 Q You -- but you testified that, nonetheless, the letter did



Seery - Cross

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1 not cause you to conduct yourself in any other manner than you  
2 would have conducted had you not received the letter; isn't  
3 that right?

4 A That's correct.

5 Q So I think there's some confusion, then, and I just want  
6 to clear this up. There was earlier testimony, both at your  
7 deposition, that -- that my clients actually interfered with  
8 and caused trades not to occur on or around December 22nd and  
9 23rd of 2020. And that's not correct.

10 MR. MORRIS: Objection. Your Honor, the evidence is  
11 in the record.

12 MR. HOGEWOOD: Okay. Well, let me --

13 THE COURT: All right. You're going to have to  
14 rephrase.

15 BY MR. HOGEWOOD:

16 Q Yeah. Let me -- let me say it differently. Focusing  
17 solely on December of 2020, every trade that you initiated  
18 closed; isn't that correct?

19 A Every trade. Yes. We did not fail one trade.

20 Q Okay. And so the issue that you have raised in your  
21 pleading is that there were -- there was an expectation that  
22 employees of my clients would book trades, which is  
23 essentially a backroom operation, after the trade has closed.  
24 Isn't that right?

25 A That's incorrect.

Seery - Cross

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1 Q Okay. So, once again, let me just get -- there were no  
2 trades that you initiated that failed to close; is that right?

3 A That's correct.

4 Q And nothing that was done by the Defendants resulted in a  
5 trade that you wished to make in December of 2020 to fail to  
6 occur or fail to close; isn't that right?

7 A That incorrect.

8 Q So you initiated a trade that did not close?

9 A Yes.

10 Q In December of 2020? And when was that?

11 A I believe that's the case, yes.

12 Q And specifically what trade did not close that you  
13 initiated?

14 A I'd have to check the notes, but the specific trades were  
15 my attempt to initiate the trade with the desk. Then the  
16 trading desk goes into the market and makes the sale. Once  
17 it's inputted into the order management system, referred to as  
18 an OMS, then it gets processed for closing. In November and  
19 in December, Mr. Dondero instructed those employees not to  
20 initiate those trades. So there was never an agreement. When  
21 I initiated a trade, which was the workaround you saw referred  
22 to, I quite simply called Jefferies directly and I had the  
23 back-office folks manually input it instead of the trading  
24 desk.

25 Sorry. I just wanted to make sure we cleared that up.

Seery - Cross

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1 Q No, just -- that -- that's helpful to understand. But I  
2 think, focusing again solely on December, every trade you  
3 initiated closed?

4 A Every trade that I actually went and made in the market  
5 closed.

6 Q And indeed, if --

7 MR. HOGEWOOD: I observed your demonstrative  
8 exhibits, and if I could ask that the one related to the Avaya  
9 trades be called up, Mr. Morris. is that possible?

10 MR. MORRIS: Yeah, sure. Is that the first one with  
11 Mr. Dondero's trades, or do you want the chart?

12 MR. HOGEWOOD: The -- the -- I think it was your  
13 Demonstrative #2 that showed the timeline of the trades.

14 MR. MORRIS: Yeah. You bet.

15 (Pause.)

16 MR. HOGEWOOD: Thank you. Thank you very much.

17 BY MR. HOGEWOOD:

18 Q So, just so I understand this document, the bottom axis is  
19 the passage of time, and when we get into the period between  
20 November of 2020 and the end of 2020, 12/31/2020, there are --  
21 there's a green bar that has the numbers 50,000 at the top of  
22 it. That reflects what, Mr. Seery? The number of shares or  
23 the dollar amount of the trades?

24 A Number of shares.

25 Q And while this is not date-specific, do you know when

Seery - Cross

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1 those sets of \$50,000 trades happened? Or --

2 A I don't --

3 Q -- 50,000 shares trades happened?

4 A I don't know the specific dates off the top of my head,  
5 no.

6 Q But looking at it just in comparison to the calendar, that  
7 -- that's awfully close to December 22nd and 23rd, is it not?

8 A It appears to be, yes.

9 MR. HOGEWOOD: And Mr. Morris, if the I guess it's  
10 the SKY document could be pulled up as well? I just want to  
11 be clear --

12 MR. MORRIS: Demonstrative #3, please.

13 MR. HOGEWOOD: Yes. Thank you.

14 BY MR. HOGEWOOD:

15 Q The timeline on this demonstrative is similar, is it not?

16 A Yes, it is.

17 Q It's showing trades by day throughout the course of the  
18 year?

19 A That's correct.

20 Q And again, there are a significant number of trades in SKY  
21 on what looks awfully close to the few days before Christmas  
22 of 2020; is that right?

23 A That's correct.

24 Q Okay. And this is the period of time that we're talking  
25 about there being interference by the Defendants' employees;

Seery - Cross

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1 is that right?

2 A Yes.

3 Q Okay. I'll move on. So, the next letter in question was  
4 one that came the day after, on December 23rd. Again, that  
5 was a letter from me to your counsel. Do you recall that  
6 letter?

7 A Yes.

8 Q And the letter of the 23rd, if we need to look at it, is  
9 the EEEE, Docket 39. You read that letter as well?

10 A Yes.

11 Q And you disagreed with the position taken in the letter?

12 A I'm trying to remember the specific position in that one.  
13 Was that the one threatening to try to terminate the CLOs  
14 without having checked whether there's cause? I just don't  
15 recall.

16 Q Why don't we call it up, if we can?

17 MR. HOGEWOOD: Mr. Morris, if you could help us,  
18 because it's one of your exhibits, that would be great. But  
19 Ms. Mather has got it up, so that's great.

20 BY MR. HOGEWOOD:

21 Q Mr. Seery, can you see the December 23rd letter?

22 A I can, yes.

23 Q And I think you referred to it as a threat to terminate  
24 the portfolio management contracts?

25 A I wasn't sure. That's why I was just asking if this was

Seery - Cross

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1 that one. I don't -- I don't recall.

2 Q Right. And if you review the first page and the second  
3 page, does that confirm your recollection that that is the one  
4 related to portfolio management contracts?

5 A I can't see the second page. I believe it is. I'm not  
6 trying to --

7 Q Yeah, no, --

8 A If you represent, I'll accept it.

9 Q Take your time.

10 A (Pause.) Yes.

11 Q Okay. And I think you already said this: You strenuously  
12 disagreed with the positions stated in the letter?

13 A Yes.

14 Q But again, you were not intimidated by the letter?

15 A Intimidated? No.

16 Q The letter didn't cause you to change your investment  
17 strategy?

18 A No.

19 Q It didn't cause you to trade or not trade in a particular  
20 manner?

21 A No.

22 Q You continued to function the Debtor's operations as you  
23 deemed appropriate?

24 A Yes.

25 Q To your knowledge, no CLO or Issuer has taken any steps to

Seery - Cross

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1 remove the Debtor as the portfolio manager?

2 A The CLO or the Issuers?

3 Q Yeah. No one's -- no one's taken a position that you  
4 should -- that the Debtor should be removed as a portfolio  
5 manager?

6 A Not -- not from the Issuers, no.

7 Q And -- or, I'm sorry. And so when you -- when you brought  
8 a distinction between the Issuer and the CLO, are you -- are  
9 you referring to CLO Holdco?

10 A No.

11 Q Okay. Has a CLO taken steps to remove the Debtor as a  
12 portfolio manager?

13 A The CLO is the Issuer.

14 Q Okay.

15 A So the answer is no.

16 Q Okay. So no one has -- no one has acted to take any -- to  
17 do anything as it relates to the removal of the Debtor as the  
18 portfolio manager?

19 MR. MORRIS: Objection to the form of the question.

20 THE COURT: Overruled.

21 THE WITNESS: I'm quite sure the CLO Issuers haven't,  
22 as they agreed and we've been working with them on an  
23 assumption. With respect to what your clients have done, I  
24 don't know.

25 BY MR. HOGEWOOD:

Seery - Cross

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1 Q But you don't have any evidence that my clients have taken  
2 any action in violation of the automatic stay to -- to move or  
3 encourage the removal of the Debtor as the portfolio manager,  
4 do you?

5 A Other than the letter? No.

6 Q Other than the letter between me and your counsel?

7 A Correct.

8 Q All right. So, and that letter expressly states that any  
9 of those actions that would be taken are subject to the  
10 automatic stay and the Bankruptcy Code; is that right?

11 A That's correct.

12 Q And as we sit here today, the Debtor is not in breach of  
13 any contract with any of the Issuers; is that right?

14 A That's correct.

15 Q And the letter didn't cause the Debtor to breach any  
16 contract with any Issuer, did it?

17 A Did not.

18 Q And I think you've already testified today and you also  
19 testified in deposition that you anticipate that the -- all of  
20 the CLOs will consent to the assumption of the portfolio  
21 management agreements in the context of confirmation; is that  
22 right?

23 A Yes.

24 Q And the plan supplement that you recently filed, you  
25 provide a mechanism by which the issue of for-cause



Seery - Cross

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1 termination is to be resolved, do you not?

2 A I don't recall if there's a specific provision in the plan  
3 supplement. We certainly have, either in the plan or in the  
4 plan supplement, a provision related to the gatekeeper  
5 function.

6 Q And that's similar to the settlement that you entered into  
7 with CLO Holdco in terms of resolving both their objection to  
8 confirmation and the lawsuit against them today; is that  
9 right?

10 A I believe it's similar.

11 Q Okay. And the gatekeeper is the Bankruptcy Court to  
12 determine, short of a full-blown trial, that if cause exists,  
13 isn't that correct, under the plan?

14 A Among other functions, yes.

15 Q So if the Court confirms the plan, then the concerns that  
16 you have are resolved by the gatekeeper function that is the  
17 subject of this motion; is that right?

18 A I think it depends on the contents of the confirmation  
19 order.

20 Q And if the Court denies confirmation, then the stay  
21 remains in effect and the letter related to the removal of the  
22 portfolio manager was expressly subject to the stay; isn't  
23 that right?

24 A If the letter says it's subject to the stay? It does say  
25 that, but it says other false things as well, so I'm not sure

Seery - Cross

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1 -- I don't know exactly what you're asking me there.

2 Q All right. It wasn't a very good question, frankly.

3 Your counsel responded to the December 23rd letter as well  
4 and demanded a retraction; isn't that right?

5 A Yes.

6 Q And that was sort of a separate (audio gap) with counsel?

7 A I'm sorry. You broke up for a second there, sir. I'm  
8 sorry.

9 Q I'm sorry. That -- that' -- let's just skip that. You  
10 had testified that neither letter was withdrawn?

11 A I believe that's correct, yes.

12 Q Are you familiar -- and -- are you familiar with the fact  
13 that, in the response letters, your counsel insisted that  
14 there be a response and withdrawal by not later than, I  
15 believe, 5:00 on December 28th? Do you recall that?

16 A I don't recall that specifically, but I accept your  
17 representation.

18 Q And do you know whether or not there was a response dated  
19 December 28th?

20 A I don't believe there was a written response. I don't --  
21 I don't recall.

22 Q All right.

23 MR. HOGWOOD: Ms. Mather, can you call up  
24 Defendant's Exhibit 84, which is at Docket 45, please? Thank  
25 you.

Seery - Cross

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1 BY MR. HOGEWOOD:

2 Q So, Mr. Seery, have you ever seen this letter dated  
3 December 28?

4 A I believe I have, yes.

5 Q And this letter was not attached to the complaint nor your  
6 declaration nor the request for a TRO or preliminary  
7 injunction, was it?

8 A If you say it wasn't. I don't recall specifically.

9 Q Okay. So, you, by seeing this, you realize now there was  
10 a response by the 28th. Is that right?

11 A Yes.

12 Q And in the -- let me just direct your attention to the  
13 final sentence of the first paragraph. It says -- it makes  
14 once again clear that the -- any efforts to remove the Debtor  
15 as manager would be subject to applicable orders of the  
16 pending bankruptcy case, provisions of the Bankruptcy Code,  
17 and specifically, the automatic stay. Do you see that?

18 A I apologize. I don't see it. Which paragraph?

19 Q I'm at the very last sentence of the first paragraph.  
20 There's a sentence that --

21 A (reading) Subject to applicable orders in the pending  
22 bankruptcy case, provisions of the Bankruptcy Code,  
23 specifically, the automatic stay.

24 I read that, yes.

25 Q Yes. Okay. There was some testimony about the letter

Seery - Cross

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1 related to Mr. Dondero's eviction. I don't intend to belabor  
2 that. But once again, that was a letter between counsel, was  
3 it not?

4 A I believe it -- I believe it was. I don't recall  
5 specifically now. I assume -- I assume all of these were  
6 directed to counsel.

7 Q Right. And again, the fact that counsel wrote a letter  
8 requesting that the eviction not occur did not change your  
9 process and you proceeded with the eviction, did you not?

10 A I think the letter came after Mr. Dondero was no longer  
11 permitted. Eviction is an odd word. He was no longer an  
12 employee, so employee not being able to come into the office  
13 and hang around and disrupt business isn't exactly an  
14 eviction. So I disagree with your characterization there.

15 Q Okay. Well, so I'll just leave that. I mean, the --  
16 since this exchange of letters, are you aware -- I mean, there  
17 was some testimony about the Debtors presenting the Defendants  
18 with the choice of either filing a motion for relief from stay  
19 or this injunction proceeding would be brought. Isn't that  
20 right?

21 A Yes.

22 Q And no motion for relief from stay was filed, and  
23 therefore this injection proceeding was brought. Is that  
24 correct?

25 A Yes.

Seery - Cross

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1 Q So the other thing that you know was filed by the  
2 Defendants was an objection to confirmation, which was due on  
3 January 5th of 2020, correct?

4 A I'm sorry, Mr. Hogewood. You broke up. Did you say the  
5 other paper or pleading that was filed?

6 Q The pleading that was filed by the -- these who are  
7 Defendants as well as other parties to this case was an  
8 objection to confirmation, the deadline for which was January  
9 5, 2020. Are you familiar that an objection to confirmation  
10 was filed?

11 A I'm familiar that one was filed, yes.

12 Q And so the objection to confirmation raised many of these  
13 same issues regarding the circumstances under which the  
14 various CLO agreements could be assumed; isn't that right?

15 A I'm not aware of the specifics of the objection.

16 Q Okay. But nonetheless, my client was under no obligation  
17 to initiate yet another motion or lawsuit or pleading against  
18 the Debtor beyond objecting to confirmation, was it?

19 A An obligation? No.

20 Q And since the objection to confirmation has been filed,  
21 there have been a number of pleadings filed in the case. We  
22 obviously were required to respond to the motion for  
23 preliminary injunction, and it says there's been an objection  
24 filed to that. Are you aware of that?

25 A That -- that you objected to the preliminary injunction?

Seery - Cross

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1 Q Yes.

2 A Yes, yes, I'm aware of that.

3 Q And --

4 A I'm very aware.

5 Q And you're aware that there was a proposed settlement with  
6 HarbourVest; is that correct?

7 A We have an approved settlement with HarbourVest.

8 Q Right. And there were objections filed to that particular  
9 -- or, to that particular settlement agreement, were there  
10 not?

11 A Yes.

12 Q But none of my clients participated in that objection, did  
13 they?

14 A I don't recall the specifics of your clients versus the  
15 other Dondero entities, but I'm certain Mr. Dondero  
16 participated.

17 Q But the De... the parties that we represent did not object  
18 to the settlement?

19 A I don't recall specifically.

20 Q Okay. And another motion that was filed was for an  
21 examiner. Isn't that correct?

22 A I believe that's the case, yes.

23 Q Yeah. And my clients didn't join that motion, either?

24 A No. It's a bit of whack-a-mole, but they did not -- they  
25 did not -- I don't -- I don't know. To be honest, I don't

Seery - Cross

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1 know if they did or not.

2 Q All right. Toward the end of your testimony, you were  
3 giving some information about the value of these management  
4 contracts in terms of income over the course of the coming  
5 year or two. What is the projected revenue with respect to  
6 these management contracts?

7 A Do you mean the CLO 1.0 management contracts?

8 Q Yes.

9 A They generate about four-and-a-half to five million  
10 dollars a year, depending on the asset base in total, but  
11 that's accrual, as I mentioned earlier. It doesn't all come  
12 in in cash. It depends on the waterfall. Expect about two-  
13 and-a-half to 2.7 million to come in per year during the  
14 course of the projected time period.

15 (Echoing.)

16 Q Have you done any sort of profitability analysis on the  
17 management contracts?

18 A Not specifically on those contracts, no. We look at the  
19 --

20 Q Okay.

21 A -- aggregate of the Debtor's receipts versus its costs.

22 Q Can you -- so, --

23 MR. HOGWOOD: Ms. Mather, can you call up the  
24 disclosure statement? This is Docket 1473. And in  
25 particular, Page 176.

Seery - Cross

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1 BY MR. HOGEWOOD:

2 Q So, I'm, Mr. Seery, I'm trying to square the 779 for the  
3 month ended -- month period ended in March '21 and no further  
4 revenue coming in on management fees with what you just said.

5 A I'm not -- I'm not sure why. This should -- certainly  
6 should have the management fees according to the CLOs if this  
7 was included in the assumption of those. We have revenue,  
8 they do generate revenue, they currently generate and they  
9 will continue to generate.

10 Q But this is the disclosure statement approved by the  
11 Court, right?

12 A Yes. I'll have to come back and check why that for the  
13 year doesn't have it, unless we were assuming that we wouldn't  
14 receive any into the -- into this vehicle. I just, I don't  
15 know the answer.

16 MR. HOGEWOOD: Your Honor, that's all the questions I  
17 have. Thank you very much.

18 THE COURT: All right. Redirect?

19 MR. MORRIS: Can we just leave this up on the screen  
20 for a second, very quickly, for Mr. Seery? Can we put the  
21 document back?

22 REDIRECT EXAMINATION

23 BY MR. MORRIS:

24 Q Mr. Seery, do you recall that the disclosure statement was  
25 approved back in November?



Seery - Redirect

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1 A Yes.

2 THE COURT: Could you repeat the question? I  
3 couldn't hear it.

4 MR. MORRIS: Yeah. That is -- I don't know if  
5 somebody's phone is not on mute.

6 THE COURT: Yes. Please put your device on mute if  
7 you're not the one talking. Okay. Someone did. Go ahead.

8 MR. MORRIS: Thank you.

9 BY MR. MORRIS:

10 Q Mr. Seery, do you recall that this disclosure statement  
11 was approved back in November?

12 A Yeah. What I'd said earlier was that I'm not sure if the  
13 -- this plan projection conforms with our decision to maintain  
14 the CLO management contracts, and so there certainly should be  
15 revenue, while it comes in quarterly on the management fee,  
16 the base management fee. And it's not always -- each CLO is  
17 not always able to pay it in cash. It will depend on our  
18 ability to monetize assets, because they don't -- a lot of the  
19 assets are not cash-generative. Some are. For example, the  
20 Trussway loan is cash generative. The CCS loan is not.

21 But I'm just not sure why this doesn't show the management  
22 fees at all. At least for the whole year, we certainly will  
23 have them, unless this is prior to the determination to assume  
24 those agreements.

25 Q Okay. So if the assumption in November was that the

Seery - Redirect

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1 agreements would be assigned, there would be no revenue shown.

2 Is that fair?

3 A That would have been the assumption prior to us  
4 determining that we wanted to assume them, yes.

5 Q Okay. And do you recall whether the Debtor became more  
6 convinced that it would assume the contracts rather than  
7 assign them before or after the disclosure statement was  
8 approved?

9 A I don't recall the specific timing, but a number of things  
10 happened around this time. First, the Dondero entities were  
11 unwilling to even engage on assignment because they were on a  
12 much more aggressive, quote, blow up the place strategy.  
13 That's Mr. Dondero's quote.

14 Number two, we settled with HarbourVest, and that  
15 significantly increased the value of maintaining the CLO  
16 management. The HarbourVest -- or the HCLOF entities own  
17 significant preferred shares in the 1.0 CLO structures, and  
18 having management of those and being able to monetize those in  
19 accordance with the agreement, maximizing value for the  
20 benefit of HCLOF, would be far, far better for the estate than  
21 letting these assets just sit. We're not trying to drive the  
22 price down, because we wouldn't be in the business of trying  
23 to buy back those securities on the cheap. We're in the  
24 business of trying to maximize value.

25 Q All right.

Seery - Examination by the Court

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1 MR. MORRIS: I have nothing further, Your Honor.

2 THE COURT: Any recross on that redirect?

3 MR. HOGEWOOD: No, thank you, Your Honor. Appreciate  
4 the opportunity to appear before you.

5 THE COURT: All right. Thank you.

6 Mr. Seery, before we let you go, I have a couple of  
7 follow-up questions.

8 EXAMINATION BY THE COURT

9 THE COURT: These CLOs, I mean, you've said a couple  
10 of times they're not really traditional CLOs, except for the  
11 Acis 7 one. But I have this question. I've learned back in  
12 the Acis case most of what I know about CLOs, I suppose. And  
13 what the witnesses told me there were they typically had a 12-  
14 year life, and then, yeah, there was some period, you know,  
15 the first five years, seven years, something like that, where  
16 it was in a reinvestment/refinancing phase, but then after  
17 that, you know, we couldn't do that anymore and it was kind of  
18 heading towards wind-down.

19 Anyway, my long-winded question is: Do these CLOs work  
20 generally like that or not? Because you said they're  
21 atypical.

22 THE WITNESS: They -- they --

23 THE COURT: Go ahead.

24 THE WITNESS: They used to.

25 THE COURT: Okay.

Seery - Examination by the Court

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1 THE WITNESS: So these are extremely old. These go  
2 back to 2006, '07, '08. These are very old CLOs. So they're  
3 far beyond their investment periods. Some of them are coming  
4 up on their maturities on their debt. Many of them don't have  
5 any debt at all.

6 So you'll recall, Your Honor, that a CLO is a vehicle  
7 where you take x-hundred million -- we'll use 400 for fun --  
8 million dollars. You ramp up \$400 million of assets. You  
9 sell off, for our purposes, \$350 million of securities. You  
10 have the AAA securities, the AAs, all the way down. And then  
11 you have these preference shares.

12 During a period of time, as cash is generated in the CLO,  
13 the CLO is entitled to reinvest it. And that keeps it going.  
14 And then it gets beyond its reinvestment period and it's in  
15 what folks usually refer to as its harvest period. That's  
16 when oftentimes, depending on where rates are, depending on  
17 asset value, the rates for the debt obligations or the rate  
18 you can receive on your assets, you may see refinancings or  
19 resets. Otherwise, the CLOs begin to wind down. They have --  
20 they don't have a life, like a partnership with a final date,  
21 but there's maturities on the debt and then there's an  
22 expectation that they would wind down.

23 These CLOs -- which typically CLOs only invest in  
24 performing loans, and oftentimes, particularly Highland -- and  
25 I could regale you with stories how Highland would take

Seery - Examination by the Court

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1 virtually non-interest-bearing, seventh lien debt -- that's a  
2 bit of an exaggeration -- but just to keep the fees going, and  
3 not actually convert to equity. A lot of these, that wasn't  
4 an option, so they've converted to equity. So I just have one  
5 that I happen to have on my screen, Your Honor, Gleneagles.  
6 The assets in Gleneagles (echoing) are 16 -- MGMs.

7 THE COURT: Okay. Someone needs to put their phone  
8 on mute. All right. I'm sorry.

9 THE WITNESS: So it has -- it has -- the specifics  
10 aren't particularly important, but its assets are -- just this  
11 one I just pulled up; they're all a little different, and --  
12 but mostly the same -- MGM stock. This is MGM Studios, which  
13 you read about with James Bond, a very valuable asset. Across  
14 the Highland platform, there's roughly \$500 million worth of  
15 stock. It doesn't pay off any income. So if it had debt --  
16 and I'm not sure if Gleneagles still has any; I'd have to  
17 switch screens; I don't believe it does; if it does, it's  
18 small -- it wouldn't get any income-generating -- that's not  
19 income generating asset.

20 Vistra, which is the TXU stock I talked about before, is  
21 the next biggest asset. Skyline Corporation, which was the  
22 one we were selling. That's no longer in there. TCI  
23 portfolio, which is a Dondero real estate asset it has, it's  
24 an old Las Vegas and Phoenix, Arizona real estate  
25 developments. Not income-generating. Not that they don't

Seery - Examination by the Court

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1 have value, but this is much more like what would be referred  
2 to as a closed-end fund. It's not going to go out and buy  
3 anything. It can't. It can only generate cash by selling  
4 assets, give that cash to the trustee, and then the trustee  
5 pays it through the waterfall. And that's the way all of  
6 these CLOs work.

7 Now, some of them do have debt. And some of them have a  
8 lot of debt, and the preferred shares will never be worth any  
9 money, so we refer to those as being underwater. No surprise,  
10 the Dondero-related entities don't own any of those junior  
11 securities.

12 The -- some do have debt. A lot of that debt is going to  
13 get paid off in the first half of the year because there'll be  
14 refinancings at Trussway and a refinancing at Cornerstone.  
15 They own debt, and that'll generate cash. It'll go to the  
16 CLOs, go to the trustee. First it goes to pay the obligations  
17 for the outstanding debt of the CLO, and then the asset  
18 dollars, they get put through the waterfall to pay the more  
19 junior securities.

20 THE COURT: Okay. And --

21 THE WITNESS: And I --

22 THE COURT: The --

23 THE WITNESS: I was going to give you -- I contrast  
24 that to a more typical CLO, which is whether it's beyond its  
25 investment period or not, will have something like 150 to 250,

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1 sometimes more, loans in it. 150 would be on the loan side.  
2 It'll own -- own those in smaller amounts. It has  
3 requirements as to what its concentrations are in different  
4 buckets of types of assets. It has to return -- it has to  
5 have an income-generating ability to satisfy certain covenants  
6 in its debt obligations and in the indenture. And then it  
7 will, once it gets past its investment period, it will start  
8 to harvest those assets.

9 There are different ways for the CLO manager to swap  
10 assets, to stay in compliance, to extend out the tenure, but  
11 usually markets start to move and there's some reason for the  
12 CLO manager to do something like a reset or a refinancing or  
13 to call the CLO.

14 So you'll see a number -- there was one this week, and  
15 there'll be a number because of the conditions in the market  
16 -- of CLOs called by the, effectively, the equity, saying,  
17 Great time to sell, I don't need the short income, call the  
18 CLO, do a BWIC or some other way to get dollars for all of the  
19 assets, pay off all of my debt, and give me the balance of the  
20 proceeds.

21 THE COURT: Okay. All right. And the plan  
22 contemplates that these will all be wound down over a two-year  
23 period, correct?

24 THE WITNESS: It's not a hard -- it's not a hard  
25 period.

Seery - Examination by the Court

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1 THE COURT: Okay.

2 THE WITNESS: So it's not a two-year period. We're  
3 going to -- we're going to manage these assets, as any asset  
4 manager would, and we've had direct discussions with some of  
5 the underlying holders, including one of the biggest investors  
6 in the world who's an investor in the CLO but also has a  
7 couple separate accounts which they want us to manage, and  
8 we'll look for opportunities, depending on the market. We're  
9 not going to -- we're not going to just sell. It's not a  
10 liquidation. We're going to find opportunities where, if we  
11 believe it's the right value, we'll sell. That doesn't mean  
12 we'll sell it all in a big chunk. We may manage pieces. We  
13 may hold on to some.

14 Some of them may perform -- some of the assets may  
15 actually do things differently than others. For example,  
16 Cornerstone, for unknown reasons, has \$60 million of MGM  
17 stock, not an asset that you'd think you'd stuff into a  
18 healthcare business, but this is Highland. That may be sold  
19 before, for example, Gleneagles sells its MGM. It'll just  
20 depend on, you know, market and the need of the specific  
21 investor.

22 THE COURT: All right. Thank you. That's all the  
23 questions I have.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: All right. So, Mr. Seery, I think we're



Seery - Examination by the Court

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1 done with you, but we hope you'll stick around for however  
2 longer this goes.

3 THE WITNESS: I will indeed.

4 THE COURT: Okay.

5 THE WITNESS: Thank you.

6 THE COURT: Does the Debtor rest, Mr. Morris?

7 MR. MORRIS: Yes, Your Honor. There were those  
8 couple of documents that we had used from the different docket  
9 that we'll certainly put on the docket with the supplement  
10 witness and exhibit list. I just wanted to point that out.  
11 And I, you know, I don't recall, frankly, if I moved into  
12 evidence each of those extras, and I'm happy to go through it,  
13 but it's very important to me that those documents be part of  
14 the record. So --

15 THE COURT: Okay. I think what you added was TTTTT,  
16 and I think I admitted it. You moved to admit it, and I said  
17 yes, but you're going to have to file it on the docket --

18 MR. MORRIS: Yeah.

19 THE COURT: -- as a supplemental exhibit.

20 MR. MORRIS: Right. And then there were the couple  
21 from the other -- let me see if I can get them.

22 THE COURT: I admitted everything else that you filed  
23 on the docket except UUUU, VVVV, and AAAAA.

24 MR. HOGEWOOD: Yeah. And that's fine.

25 Can we, Ms. Canty, going from Docket No. 46, can we just

1 call up Exhibit K to make sure that that's in evidence?  
2 Docket 46 from the Dondero adversary proceeding.

3 Okay. So this was the letter, Your Honor, that I used  
4 earlier today with Mr. Dondero. If you scroll down, where I  
5 examined him on the trading. This is what led into the  
6 December 22nd trading, if you go to the next page. So if it's  
7 not in evidence, I would respectfully request that this  
8 document be admitted into evidence, Your Honor.

9 MR. RUKAVINA: Your Honor, I object. This document  
10 is hearsay of Mr. Pomerantz.

11 THE COURT: Okay.

12 MR. MORRIS: Mr. Dondero has already -- I'm sorry,  
13 Your Honor.

14 THE COURT: Okay. So this is -- I wholesale-admitted  
15 all of your exhibits with those three carved out that I  
16 mentioned. So you're saying I've not admitted this one yet?

17 MR. MORRIS: I just don't recall, because this wasn't  
18 on the exhibit list. I will point out that we had no objection  
19 to the entry into the evidence of all of K&L Gates letters,  
20 and I'm really a little surprised, having heard the testimony  
21 from Mr. Dondero on this particular letter, that there would  
22 be an objection. But I would respectfully request that it be  
23 admitted as an exception to the hearsay rule.

24 THE COURT: All right. Well, I'm going to overrule  
25 the objection. I'll admit it.

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1 So, again, it has to be supplemented on the docket.

2 (Debtor's Exhibit K is received into evidence)

3 MR. MORRIS: Yes. And there's just one other  
4 document, Your Honor, from that same docket. It's Exhibit D,  
5 Ms. Canty. I just want to make sure that's in the record as  
6 well. And I do apologize again, Your Honor.

7 THE COURT: Okay.

8 MR. MORRIS: I didn't realize until I was reading --

9 THE COURT: We're getting terrible distortion. I  
10 don't know where it's coming from, but --

11 MR. MORRIS: Okay. And this is, this is the email  
12 that I -- it's Mr. Dondero's own statement, so it's not even  
13 hearsay, but I just want to make sure this is part of the  
14 evidentiary record, Your Honor. So I move for the admission  
15 of this document as well to our exhibit list.

16 MR. RUKAVINA: I believe this document has been  
17 admitted. I believe -- I believe --

18 (Echoing.)

19 MR. RUKAVINA: Is that us? Testing.

20 THE COURT: All right. Mike, where is that coming  
21 from?

22 (Clerk advises.)

23 THE COURT: Okay. Mike thinks it's Mr. Morris, but  
24 -- so put yourself on mute.

25 Mr. Rukavina, go ahead.

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1 MR. RUKAVINA: Your Honor, I think this exhibit is in  
2 already. If it's not, no objection.

3 THE COURT: All right. So it will be admitted, and  
4 again, you need to file it as a supplement, Mr. Morris.

5 (Debtor's Exhibit D is received into evidence)

6 MR. MORRIS: Yeah. Thank you, Your Honor. The  
7 Debtor rests.

8 THE COURT: All right. Mr. Rukavina, I want to go a  
9 while longer, so let's at least -- do you have Mr. Dondero as  
10 well as Mr. Post?

11 MR. RUKAVINA: I do, Your Honor. I have both.

12 THE COURT: Okay. Well, let's go. You may call your  
13 witness.

14 MR. RUKAVINA: Your Honor, we'll call Jason Post.

15 THE COURT: All right. Mr. Post, I swore you in  
16 earlier and I consider you still under oath. Do you  
17 understand that?

18 MR. POST: I do.

19 THE COURT: All right. Go ahead.

20 JASON POST, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

21 MR. RUKAVINA: Oh, turn on the video. Can you see  
22 how to do that? Is Jason on the video? Okay. All right.  
23 Mr. Post? Hold on a second. I'm hearing myself.

24 THE WITNESS: I'm hearing the same.

25 MR. RUKAVINA: Let me turn down my volume. Testing.

Post - Direct

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1 Okay. Mr. Post, can you hear me?

2 THE WITNESS: Yes.

3 MR. RUKAVINA: Okay.

4 DIRECT EXAMINATION

5 BY MR. RUKAVINA:

6 Q You were asked about some of your background and  
7 qualifications. Just so that the record is clear, you are the  
8 chief compliance officer for both two Advisors and each of the  
9 Funds, correct?

10 A Correct.

11 Q And I think we refer to these three defendant funds as  
12 retail funds; is that correct?

13 A Correct.

14 Q Describe what we mean or what you mean by a retail fund.

15 A I look at it two ways. There's private funds, which are  
16 institutional in nature, and retail funds, which are comprised  
17 of open-end funds, closed-end funds, BDCs, ETFs, and that  
18 constitutes the suite of funds that are advised by Highland  
19 Capital Management Fund Advisors and NexPoint Advisors. And  
20 they generally have a broad swath of investors, including  
21 institutional investors, but also, you know, just regular mom-  
22 and-pop investors.

23 Q Okay. So, for the Highland -- I'm sorry, for the three  
24 retail funds, how much in ballpark investments do they have in  
25 the CLOs that are at issue today? Ballpark.

Post - Direct

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1 A Maybe call it a hundred million, ballpark. Or a hundred  
2 million, give or take.

3 Q Okay. And for all of the CLOs that Highland manages that  
4 the Advisors and other Funds have an interest in, do you have  
5 an estimate of how much it manages of CLO assets?

6 A I believe it's approximately a billion, a little over a  
7 billion that HCMLP manages for its CLO assets.

8 Q Do you have an estimate of how many individual investors  
9 there are in the three retail funds?

10 A I -- thousands. I don't have an exact number.

11 Q Okay. And I think you mentioned some of the types. Do  
12 you have any names of the types of investors that Her Honor  
13 might know or have heard of before?

14 A Off the top of my head, I do not, just -- but they're  
15 generally constituted or characterized of the investor types  
16 that I mentioned earlier.

17 Q Okay. Now, these three retail funds, do they own voting  
18 preference shares in any of the CLOs that the Debtor manages?

19 A Yes.

20 Q Okay. Do they own a majority in any of those CLOs' voting  
21 preference shares?

22 A In aggregate, across the three, they would.

23 Q Okay.

24 A With other CLOs.

25 Q What are those three CLOs, sir?

Post - Direct

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1 A I believe it's Greenbrier, Graceland, and Stratford, if I  
2 recall correctly.

3 MR. RUKAVINA: Your Honor, have you received a  
4 couriered binder of our exhibits?

5 THE COURT: I have. I've got them right here.

6 MR. RUKAVINA: Now I can't hear the judge. What's  
7 she saying?

8 THE COURT: Yes. I've got them.

9 MR. RUKAVINA: I think you're on mute, Judge.

10 MR. VASEK: No, you turned your volume down.

11 MR. RUKAVINA: Oh. I apologize, Your Honor.

12 So, Mr. Vasek, if you'll please put Exhibit 2 up.

13 BY MR. RUKAVINA:

14 Q Mr. Post, are you the custodian of records for the Funds  
15 and Advisors?

16 A Yes. We're required to keep records of ownership and  
17 trades for the Funds involved.

18 Q And you are an actual officer of these Funds and Advisors,  
19 correct?

20 A Correct.

21 Q Okay. Are you familiar with this Exhibit 2?

22 A I am.

23 Q Did you participate in pulling together the underlying  
24 information with others to prepare Exhibit 2?

25 A I did.

Post - Direct

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1 Q Does Exhibit 2 accurately reflect the current ownership of  
2 the various CLOs by the three retail funds that are --

3 A At the time it was put together, I believe it did.

4 Q And approximately when was that?

5 A I believe it was in the November time frame, middle of  
6 November, end of November.

7 Q Do you have reason to believe that the numbers we're  
8 referring to would be materially different today?

9 A I don't believe they would be materially different.

10 MR. RUKAVINA: Your Honor, I move for the admission  
11 of Exhibit 2 as a summary of underlying data.

12 THE COURT: All right. Any objection?

13 MR. MORRIS: Yes, Your Honor. It's hearsay. I  
14 understand that the witness has testified to it, but just as I  
15 put in the backup for my demonstrative, where's the backup?  
16 We're just supposed to take his word for it? There's no  
17 ability to check this. This is not evidence. It's a  
18 demonstrative.

19 THE COURT: All right. Mr. Rukavina, do you have  
20 backup?

21 MR. RUKAVINA: Let me ask the witness a couple more  
22 questions.

23 BY MR. RUKAVINA:

24 Q What would be the backup for this Exhibit 2?

25 A We'd have to pull the holdings from the intranet and that



Post - Direct

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1 would identify the quantity that's held by each of the  
2 respective funds and then an aggregate that, over the  
3 preference shares outstanding, would give you the percentages  
4 that are outlined in this exhibit.

5 Q Okay. And is that a database that you have personal  
6 access and authority over?

7 A I have personal access to it. Yes.

8 Q Okay.

9 MR. MORRIS: Your Honor, *voir dire*?

10 BY MR. RUKAVINA:

11 Q Can you easily take that data from a computer and show it  
12 to the Court here today?

13 A Yes. It would just require the CUSIPs for each of the  
14 preference shares and then plug it into the intranet and then  
15 that would provide a screenshot of the ownership of the CLOs.

16 Q And is this what that is, basically?

17 A This is an aggregation -- or, this is a percentage of the  
18 shares outstanding, the preference shares. So what would be  
19 shown on the intranet would be the quantity and then you'd  
20 have to tie that back to the shares outstanding and that would  
21 give you the percentages that are shown on this exhibit.

22 MR. MORRIS: *Voir dire*, Your Honor?

23 THE COURT: I'm sorry?

24 MR. MORRIS: May I inquire before this --

25 THE COURT: Mr. Morris, is that you? Okay. You want

Post - Voir Dire

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1 to take him on *voir dire*?

2 MR. MORRIS: Yes.

3 THE COURT: Go ahead. Uh-huh.

4 VOIR DIRE EXAMINATION

5 BY MR. MORRIS:

6 Q Yes. Mr. Post, did you prepare this document?

7 A I provided information and the document was ultimately  
8 prepared by counsel.

9 Q So you didn't personally prepare this, right?

10 A I didn't personally put this chart together.

11 Q And you didn't personally make the calculations on this  
12 chart, right?

13 A I would have supplied or assisted in supplying the  
14 holdings with reference to the shares outstanding and then  
15 they would have done the math to place the percentages.

16 Q I'm asking a very specific question. You didn't do the  
17 calculations necessary to come up with the percentages on this  
18 chart, right?

19 A Me personally, no, I did not.

20 Q And you can't verify that this chart is accurate, can you?

21 A I provided, provided the information. Then it's a  
22 mathematical calculation.

23 Q Okay. You didn't take any steps to determine the accuracy  
24 of this chart, right? You relied on others?

25 A There's a -- I would have cross -- you know, maybe cross-

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1 referenced some of the percentages against another spreadsheet  
2 that was -- that we had internally.

3 Q Sir, I didn't want to know what you would have done. You  
4 didn't do anything to confirm the accuracy of all of the  
5 numbers on this page, correct?

6 A I believe I may have spot-checked a couple of them. I  
7 can't recall specifically.

8 MR. MORRIS: Your Honor, not only don't we have the  
9 backup, but this witness isn't even competent to testify to  
10 the accuracy of the chart. I renew my objection.

11 THE COURT: All right. I sustain the objection.

12 MR. RUKAVINA: Your Honor, I'll --

13 THE COURT: It's not allowed.

14 MR. RUKAVINA: Going back to the -- take that down.

15 THE COURT: All right. Mr. Rukavina, we're -- our  
16 connection to your office is suddenly not very good. Both you  
17 and Mr. Post are very hard to hear. So let's see what we can  
18 to improve.

19 MR. RUKAVINA: Is it a question of loudness or  
20 quality?

21 THE COURT: Quality. And I heard you fine just then,  
22 but -- so let's try again.

23 DIRECT EXAMINATION, RESUMED

24 BY MR. RUKAVINA:

25 Q Mr. Post, let's go back to those retail funds. How are

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1 those funds managed at the top level?

2 A They're overseen by a board of trustees.

3 Q Okay. Do you interact with that board of trustees  
4 periodically?

5 A I do.

6 Q Okay. Approximately how often?

7 A At least quarterly, and generally intervening periods.  
8 I'd probably say anywhere from every five to six weeks, if not  
9 more frequent.

10 Q Have you been communicating with them more frequently  
11 recently?

12 A Yes.

13 Q As the CCO of the funds, who do you ultimately report to?

14 A The board.

15 Q Is Mr. Dondero on any of those boards?

16 A He is not.

17 Q Okay. Are those boards capable, to your experience, of  
18 making independent decisions?

19 MR. MORRIS: Objection to the form of the question.

20 THE COURT: Overruled.

21 THE WITNESS: I think the question, is are they  
22 capable of making independent determinations? Yes.

23 BY MR. RUKAVINA:

24 Q Okay. Explain the interaction between the Fund Advisors  
25 and the retail funds. What -- what does the one do for the

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1 other, if you will?

2 A I'm sorry. Can you repeat that? I didn't -- I didn't  
3 hear the question.

4 Q So, we have the three retail funds.

5 A Yes.

6 Q What relationship, if any, is there between the two  
7 Advisor defendants and any retail fund defendants?

8 A So, there's an investment advisory agreement that the  
9 Funds have entered into with the investment advisor, and the  
10 investment advisor performs investment functions on behalf of  
11 those Funds, along with other noninvestment functions.

12 Q Okay. So is it fair to conclude that, for investment  
13 purposes, the Advisors make pretty much all, if not all,  
14 decisions for the three Funds?

15 A Yes.

16 Q Okay. What about other matters that the board might  
17 consider? Do the Funds make -- I'm sorry. Do the Advisors  
18 make other decisions for the Funds, or is it an advisory role?

19 A The Advisors may make other decisions or recommendations,  
20 which they then set forth to the board for their approval, if  
21 needed.

22 Q Okay. Does the board have independent counsel?

23 A They do.

24 Q Okay. Have you interacted before?

25 A I have.

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1 Q And is it fair to conclude that the board not only is  
2 capable of making independent decisions but has made  
3 independent decisions recently?

4 MR. MORRIS: Objection. Leading.

5 THE COURT: Sustained.

6 THE WITNESS: They have.

7 MR. RUKAVINA: Okay.

8 THE COURT: That was --

9 MR. RUKAVINA: And we'll get --

10 THE COURT: You don't answer.

11 MR. RUKAVINA: Go into that in another bit.

12 THE WITNESS: Oh. Sorry.

13 MR. RUKAVINA: Okay.

14 BY MR. RUKAVINA:

15 Q Explain to the Court what your role as the chief  
16 compliance officer for the Advisors and the Funds is.

17 A I think, as you mentioned earlier, it's interaction with  
18 the board. Also with regulatory bodies to the extent  
19 examinations occur. It could be to ensure oversight and  
20 compliance with a fund's prospectus and SAI limitations, and  
21 then it's establishing policies and procedures and ensuring  
22 that those policies and procedures are adequate to detect any  
23 sort of violations that could occur by the Funds.

24 Q And are you an attorney?

25 A I am not.

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1 Q Do you frequently work with attorneys?

2 A I do.

3 Q Both in-house and external?

4 A Yes.

5 Q Good. And do you frequently rely on the advice of  
6 counsel?

7 A I do. At times will present, you know, if there is a  
8 question or an issue, present the background to either  
9 internal or external counsel and then request their advice on  
10 certain matters.

11 Q So when counsel was asking about why you wouldn't appear  
12 at a hearing or listen to a hearing or read a transcript of a  
13 hearing, are those the kinds of things that you would rely on  
14 counsel?

15 A Yes. If counsel were to tell me to, you know, attend the  
16 hearing, I would have attended the hearing.

17 Q Okay. Does -- do the Funds and Advisors also have in-  
18 house counsel?

19 A Yes.

20 Q I think we established that's D.C. Sauter?

21 A He's been the primary point of in-house counsel more  
22 recently, I'd say, within the past three to four months.

23 Q Okay. And would you expect that perhaps he would be  
24 attending hearings and reading transcripts instead of you for  
25 some of these litigated matters?

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1 MR. MORRIS: Objection to the form of the question.

2 THE COURT: Overruled.

3 MR. MORRIS: Leading.

4 THE COURT: Overruled.

5 THE WITNESS: I believe he would be.

6 BY MR. RUKAVINA:

7 Q Okay. Well, the implication was made, Mr. Post, that  
8 somehow you were negligent as CCO by not following the  
9 December 16th hearing. I'd like to know, --

10 THE COURT: Okay. Could you -- could you repeat --

11 BY MR. RUKAVINA:

12 Q -- Did you have counsel at the hearing and did you hear  
13 from --

14 THE COURT: Mr. Rukavina, start over with your  
15 question. It was a little hard to hear.

16 MR. RUKAVINA: Okay.

17 BY MR. RUKAVINA:

18 Q Mr. Post, the implication had been made that, because you  
19 weren't at the December 16th hearing and because you had not  
20 read the transcript, that you were somehow deficient as a CCO.  
21 I'd like to know, Did you have the benefit of outside  
22 counsel's views both before and after that hearing as to that  
23 hearing and what happened?

24 A Yes.

25 Q It's not that you put your head in the sand and ignored



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1 what's happening, is it?

2 A That is correct.

3 Q Okay. And is it fair to say that when you deal with  
4 compliance, you deal with complicated statutes and  
5 regulations?

6 A That is correct.

7 Q Okay.

8 MR. RUKAVINA: Mr. Vasek, if you'll please pull up  
9 (garbled).

10 (Pause.)

11 BY MR. RUKAVINA:

12 Q Okay. Taking you back to Mr. Morris's questions, do you  
13 recall Mr. Morris asking you whether you believe that any of  
14 the trades that were being discussed were deceptive?

15 MR. MORRIS: Hold on one second, Your Honor. What  
16 exhibit is this?

17 THE COURT: I don't know. What is it?

18 MR. RUKAVINA: Can you hear me, Mr. Post?

19 THE WITNESS: They're asking a question as to what  
20 exhibit this is.

21 MR. RUKAVINA: Your Honor, this is not an exhibit.  
22 This is a Commission Interpreting Regarding Standard of  
23 Conduct for Investment Advisors, an SEC regulation in  
24 conjunction with 17 CFR 276.

25 THE COURT: Okay. How are we --

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1 MR. RUKAVINA: So, Your Honor, these are the actual  
2 regulations.

3 THE COURT: I mean, it's -- okay. The answer to the  
4 question is it's not an exhibit. You have pulled up 17 CFR  
5 part 276. Is that what the answer is?

6 MR. RUKAVINA: Yes, Your Honor. And I haven't  
7 offered this as an exhibit.

8 THE COURT: All right.

9 MR. MORRIS: You have -- Your Honor, I don't know why  
10 this is being put up on the screen now. It's not an exhibit.  
11 It's not in the record like a couple of those that I had. I  
12 used the statute that he relied on to cross-examine him with  
13 the 206. I don't know what this is. I don't know if it's  
14 accurate. I don't know anything about it.

15 MR. RUKAVINA: Your Honor, this is a rule and  
16 regulation. This is not an exhibit. If it is an exhibit, I  
17 haven't moved to admit it yet. I'm going to use this to  
18 refresh his memory and explain why he believed that the  
19 actions were deceptive, a door opened solely by Mr. Morris.

20 MR. MORRIS: His recollection hasn't -- there's no  
21 need to refresh it yet. He hasn't even answered a question  
22 where he says, "I don't remember."

23 THE COURT: Okay. I sustain the objection here. I  
24 mean, you can ask him a question, but, again, it's kind of  
25 hard for us to tell what this is, actually. I mean,

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1 Commission Interpretation Regarding Standard of Conduct for  
2 Investment Advisors. I mean, is this actually a -- I mean,  
3 it's not a statute. I'm not even sure it's a reg. It's --

4 MR. MORRIS: Okay.

5 THE COURT: I don't know what it is. So, --

6 MR. RUKAVINA: Your Honor, we'll lay a predicate  
7 later. First, let me ask some other questions.

8 BY MR. RUKAVINA:

9 Q Again, you recall that you were asked whether, pursuant to  
10 Section 206 of the Advisers Act, you believed the trades that  
11 have been discussed were deceptive. Do you recall?

12 A Yes.

13 Q Okay. And you answered that you believed that they were  
14 deceptive?

15 A Correct. I did.

16 Q As the CCO, do you have an understanding of what role, if  
17 any, conflicts of interest play in an advisor's duties under  
18 the Advisers Act?

19 A Yes.

20 Q Okay. What is your understanding?

21 A All -- all known material conflicts of interests need to  
22 be disclosed -- need to be disclosed by the advisor to the  
23 underlying investors.

24 Q Okay. And why, why do those conflicts of interests have  
25 to be disclosed?

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1 A Because an advisor could have a view that may deviate from  
2 the underlying investors' view of how the portfolio could be  
3 managed and in contradiction to it.

4 Q And do you have an understanding as to whether, pursuant  
5 to your experience as the CEO [sic], the Advisers Act and the  
6 SEC regulations (garbled) it require an advisor to adopt the  
7 principal's goals as opposed to his or her own goals?

8 MR. MORRIS: Objection to the form of the question.  
9 Your Honor, he has not been offered as an expert. He  
10 shouldn't be permitted to provide -- this is -- this would be,  
11 at best, expert testimony. I asked him 30 different questions  
12 about his background. He's got no training. He's got no  
13 licenses. He's taken no special courses. He doesn't have  
14 anything except on-the-job training. This is not right.

15 MR. RUKAVINA: Your Honor, Mr. Morris got to ask yes-  
16 and-no questions all day, leading questions, and the witness  
17 was told that he could explain his answers. The Court told  
18 him that. And I am trying to explain his answer as to why he  
19 believed that these transactions were deceptive, especially  
20 because the allegation is that we willfully and intentionally  
21 violated the stay by sending letters that this witness  
22 authorized. So understanding his understanding is very  
23 important to Your Honor's determination of the actual --

24 THE COURT: Well, I sustain the objection.

25 MR. RUKAVINA: And Mr. Morris opened this door.

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1 THE COURT: You can ask him why he thought the  
2 actions were deceptive, but he's starting to go into what may  
3 or may not be CFRs and conflicts of interest. No. This is  
4 going well beyond asking him, Why do you think it was  
5 deceptive? And I agree: It's straying into expert testimony.

6 BY MR. RUKAVINA:

7 Q Mr. Post, you are familiar with the December 22nd AVYA  
8 and SKY sales and transactions which you were asked about by  
9 Mr. Morris and that you previously have testified about,  
10 correct?

11 A Correct.

12 Q Okay. How are you familiar with those sales and  
13 transactions as they were occurring? How did you learn about  
14 them?

15 A There was some internal email correspondence. If I recall  
16 from memory, at the bottom it provided fill information that  
17 Jefferies provided to, I believe, Mr. Seery and others on the  
18 email. And then it kind of worked its way up to get the  
19 trades that had been executed administratively booked into the  
20 OMS.

21 Q Why did you get involved with those transactions?

22 A They were requesting that employees of HCMFA book those --  
23 I'm sorry, Highland Capital Management Fund Advisors -- book  
24 those into the system. And those employees were not a party  
25 to the trade. I don't believe --

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1 Q Well, let me pause you. Let me pause you. Those two  
2 employees, who were they?

3 A Joe Sowin and Matt Pearson.

4 Q Were they at that time employees of the Debtor?

5 A They were not.

6 Q Okay. So, how did you come to learn about this ask that  
7 those two employees book -- book it?

8 A I believe there was an email that was sent to me, or I was  
9 on it. I can't recall specifically.

10 Q Okay. And did you undertake any review as to whether  
11 those two employees should or should not do what was being  
12 asked of them?

13 A Once it was brought to my attention, I discussed with -- I  
14 looked at it. It looked like, pursuant to prior  
15 correspondence with -- that Joe Sowin made, he wasn't aware of  
16 the trades.

17 You know, I also had a discussion with K&L based off of --  
18 our legal counsel based off of a prior letter that was sent,  
19 and just it didn't -- it didn't look right that they would be  
20 booking trades on behalf of the two Advisors that are named in  
21 the letters when they had nothing to do with it and weren't --  
22 weren't a part of any of the pre-trade compliance checks, et  
23 cetera.

24 Q What is a pre-trade compliance check?

25 A Well, there's an electronic system, a -- or a management

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1 system we have, the OMS, which is called Verda (phonetic).  
2 And generally, trades are entered into the system by the  
3 portfolio manager, and they then go through pre-trade  
4 compliance checks. And once those compliance checks are  
5 passed, they're then routed to the trading desk for direction  
6 or execution, where the executing brokers and the trading desk  
7 will then monitor that execution over the course of the day.  
8 And at the conclusion of the trading day, those trades, if  
9 they weren't already allocated, would be allocated, and then a  
10 trade would be sent to custodian prime brokers to identify the  
11 trades that occurred in the respective Funds for those -- or,  
12 on that day, and then they would then be dropped into the  
13 database and our -- the settlement team would kind of work to  
14 settle those trades or ensure that those trades were settled  
15 based off of the stipulated time frame for settlement on the  
16 trades.

17 Q So, in all that course of a transaction, what exactly was  
18 it that those two employees of the Advisors were being asked  
19 to do on behalf of the Debtor? What exactly were they being  
20 asked to do?

21 A To just book them in the system because they are trades  
22 that already have been executed.

23 Q Did you stop that?

24 A I believe I responded and said, you know, it -- they're  
25 employees of, if I recall, employees of one of the named

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1 Advisors, and believe those trades are in the best interest of  
2 those Advisors, and separately, you know, the Debtor has  
3 designated operators/traders that should be able to enter  
4 those trades as well, aside from Mr. Sowin and Matt Pearson.

5 Q So can you think of any reason why Mr. Seery would ask  
6 your employees, as with his own employees, to book these  
7 trades?

8 A I believe based off of past practice.

9 Q Okay. But nevertheless, those two trades did not comply  
10 with internal compliance?

11 A They weren't run through the OMS. We try and route trades  
12 through the order management system because there's pre-trade  
13 compliance checks that can be performed, and it reduces any  
14 sort of back-end reallocation or trade errors that may occur  
15 as a result of, you know, trades being entered after the fact,  
16 because quantities could be, you know, referenced incorrectly  
17 or funds could be identified incorrectly.

18 Q Based on prior practices, have these internal policies  
19 been followed when perhaps employees of the Debtor asked  
20 employees of the Advisors to take a particular action in the  
21 course of a transaction?

22 A Yes.

23 Q When internal practices are not followed, what is your  
24 job? What are you supposed to do?

25 A When internal practices are followed, --



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1 Q Are not followed.

2 A Oh. Not followed? To the extent that they're not  
3 followed, we would question, you know, number one, why weren't  
4 they followed? You know, we -- we try and have all trades  
5 booked in the OMS so that the necessary checks could be  
6 performed, and as I mentioned earlier, to avoid any  
7 reallocation or trade errors. So I would then question, you  
8 know, why was this done outside of the system?

9 Q And if you did not get an appropriate response back to  
10 your question, what are you supposed to do?

11 A If I didn't get an appropriate response, would, you know,  
12 research it further and elevate it to senior management and/or  
13 any of the board if it was ultimately an issue.

14 Q Are you supposed to stop trades or stop the process if you  
15 see something that you believe is not compliant with your  
16 obligations and the fiduciary obligations of the Advisors?

17 A Yes.

18 Q Have you done that in the past?

19 A Yes.

20 Q Have you done that frequently, or infrequently?

21 A I would say it's -- it's infrequent, but they do occur.  
22 For example, if a fund is trading in a security that it's not  
23 permitted to invest in based off of a prospectus limitation,  
24 it would get flagged in the OMS and we would then not permit  
25 the trade to go forward because it could cause the breach to

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1 go further offsides or it could cause it to go offsides.

2 Q Okay. And these December 22nd trades, were they the type  
3 of, in your past experience, problematic trades like you have  
4 interfered or stopped or intervened to stop in other  
5 situations in the past? Do you understand my question? That  
6 was an inartful question. Do you understand it?

7 A If the question is because they were done outside of the  
8 system?

9 Q Yes.

10 A And repeatedly?

11 Q Yes.

12 A I would have raised the question with the trading desk or  
13 the portfolio manager as to why that's being done, because it  
14 was not in -- not consistent with how we instruct trades be  
15 booked.

16 Q Did Mr. Dondero, for these December 22nd transactions,  
17 tell these two employees not to book the trades?

18 THE COURT: Okay. Please repeat the question. It  
19 was garbled.

20 MR. RUKAVINA: Thank you, Your Honor.

21 BY MR. RUKAVINA:

22 Q For these December 22nd trades, did Mr. Dondero tell those  
23 two employees not to book the trades?

24 MR. MORRIS: I object, Your Honor. No foundation.

25 This witness has no personal knowledge to testify to this --

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1 to answer this question.

2 THE COURT: Overruled. If he knows.

3 THE WITNESS: I do not know.

4 BY MR. RUKAVINA:

5 Q Okay. Do you have a reason to believe that he did?

6 A I don't know. I just saw the email traffic and Mr. Sowin,  
7 I believe, was questioning the trades, you know, more in the  
8 sense that he wasn't aware of them. So, I don't -- I don't  
9 know what kind of conversations, what happened in the  
10 background, just that he -- he didn't recognized that rates.

11 Q Let me try it this way. You determined that these trade  
12 would have violated the Advisors' policies and procedures,  
13 correct?

14 A Yes, because they were done outside of the OMS.

15 Q Did Mr. Dondero tell you to come to that conclusion?

16 A He did not.

17 Q Did Mr. Dondero pressure you to come to that conclusion?

18 A He did not. He had indicated that there -- there are  
19 these trades, and you should take a look at it from a legal  
20 compliance perspective, which I did.

21 Q And you talked to K&L Gates?

22 A Correct.

23 Q And when Mr. Dondero told you to look at these trades, did  
24 he suggest to you in any way, shape, or form what you should  
25 conclude or decide to do, if anything, with respect to these

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1 trades?

2 A I don't believe so.

3 Q Okay. Let's go back to that question about your view that  
4 some of what Mr. Seery was doing was deceptive under the 1940  
5 Investors Act. When did you form that view?

6 A I believe it was after it was identified that there was  
7 not (inaudible) on certain of the trades that were entered  
8 into at the end of the November time frame, the SKY and AVYA  
9 trades.

10 Q And why did you form the opinion that those trades that  
11 Mr. Seery was attempting to do or had done were deceptive  
12 under the statute that Mr. Morris asked you about?

13 A It was pursuant to reviewing them and supplemental  
14 discussion. A review with the portfolio managers and then  
15 supplemental discussion with K&L be it from a (inaudible)  
16 perspective, through, you know, perform in the best interest  
17 of your clients, it was expressed that, at least with respect  
18 to preference shareholders, they were supposed to maximize  
19 value, and those sales, they're not really maximizing value.

20 And it was also identified that the Debtor was planning to  
21 liquidate the CLOs based off of a filing within the Court  
22 within a few-year period. And the investors -- or, the Funds  
23 that invested and the preference shareholders, or preference  
24 shares, had a longer-time view in those assets.

25 So the sales, coupled with the short duration, or the

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1 anticipated, you know, two-year duration, didn't line up with  
2 the investment objective that they were seeking to maximize  
3 returns.

4 Q To your understanding and your experience, does the  
5 servicer of the CLOs owe fiduciary duties to anyone?

6 THE COURT: Okay. I cannot -- someone is flipping  
7 paper. Please stop flipping paper. Okay. Repeat your  
8 question, Mr. Rukavina.

9 MR. RUKAVINA: Thank you, Your Honor.

10 BY MR. RUKAVINA:

11 Q In your experience and in your knowledge, does the  
12 servicer of the CLOs owe fiduciary duties to anyone?

13 A They should, yeah, the underlying investors in the CLO,  
14 whether it be the Debtor or the equity holders.

15 Q Do the Advisors owe fiduciary duties to anyone?

16 MR. MORRIS: Your Honor, I'm sorry, I apologize. I  
17 really do move to strike. He's not a lawyer. There is no  
18 foundation. He's not here as an expert. There's no basis for  
19 this witness to be talking about who owes who fiduciary  
20 duties. I don't even think that's the law, what's just been  
21 stated.

22 THE COURT: Okay. I sustain.

23 MR. RUKAVINA: Okay.

24 BY MR. RUKAVINA:

25 Q Well, let me make it very easy, then. Do you have an

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1 understanding as to whether Advisors subject to the 1940 Act  
2 owe a fiduciary duty?

3 A Yes.

4 Q Do you have an understanding of how a conflict of interest  
5 plays into a fiduciary duty?

6 A Yes.

7 Q What is your understanding?

8 A If there's a material conflict of interest, it should be  
9 disclosed.

10 Q And what did you conclude with respect to Mr. Seery and  
11 the Debtor once the Debtor stated that it will liquidate  
12 within two years?

13 A That's not the investment horizon that the underlying  
14 preference shareholders have, especially with respect to the  
15 underlying assets held in those CLOs. More or less, you're --  
16 they're now put on a clock, and those preference shareholders  
17 may have a longer-term view on the underlying assets of those  
18 CLOs.

19 Q Let's move on to those December 22nd and December twenty  
20 -- well, let me strike that. You heard Mr. Seery testify that  
21 those December 22nd trades closed, correct?

22 A I did.

23 Q And did you independently look at whether that's true?

24 A I did.

25 Q And what did you conclude?

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1 A They showed a sale in the -- on the intranet.

2 Q Okay. Let's move on to the December 22nd and December  
3 23rd letters. Are you familiar with those letters from K&L  
4 Gates to counsel for the Debtor?

5 A I am.

6 Q And did you participate in preparing those letters?

7 A I did.

8 Q Okay. And I think Mr. Morris asked you and I think you  
9 testified you supported or agreed with the sending of those  
10 letters. Is that generally accurate?

11 A Yes.

12 Q Why? Why did you support sending those letters?

13 A It wasn't in the best interest of the Funds pursuant to  
14 discussions with the portfolio managers and the investment  
15 objectives that they were looking to seek any of those  
16 investment in the preference -- preference securities and  
17 CLOs.

18 Q Was that a purpose that you were trying to achieve by  
19 sending those?

20 THE COURT: Repeat the question.

21 THE WITNESS: Ah, --

22 THE COURT: Repeat the question.

23 BY MR. RUKAVINA:

24 Q Was that a purpose that you were trying to achieve by  
25 sending those letters?

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1 A Yes. I believe there was something towards the end of one  
2 or both letters that said, to the extent, you know,  
3 transactions occur, if, for lack of better words, a courtesy  
4 heads up could be given to the Funds and the Advisor.

5 Q Did you intend in any way to intimidate the Debtor by  
6 authorizing or supporting the sending of those letters?

7 A No.

8 Q Did you intend in any way to violate the automatic stay by  
9 sending those letters?

10 A No.

11 Q Were you trying to engage the Debtor in a dialogue at that  
12 time as to what to do with these CLO management agreements?

13 A Yes. I believe that was stated at one -- at the end of  
14 one or both of the letters.

15 Q And I think Mr. Morris discussed with you that the Debtor  
16 sent back letters asking you to withdraw these two letters.  
17 Do you recall that discussion?

18 A Yes.

19 Q And do you recall saying that we never withdrew these  
20 letters, right?

21 A Correct.

22 Q Why did we not withdraw these letters?

23 A Because we don't believe that the trades that are being  
24 entered into are in the best interest of the shareholders --  
25 i.e., the Funds.



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1 Q To your knowledge, did we ever, or did you ever,  
2 communicate to the Trustees or Issuers anything in the nature  
3 of instructing them to terminate the CLO management agreements  
4 with the Debtor?

5 A I did not.

6 Q To your knowledge, did anyone, for the Funds or Advisors?

7 A I don't believe so.

8 Q Did you or anyone to your knowledge communicate to the  
9 Issuers or Trustees that the process of removing the Debtor as  
10 manager should commence?

11 A I don't believe so.

12 Q Okay. To your knowledge, have any of the Issuers or  
13 Trustees undertaken any steps to remove the Debtor or  
14 terminate these contracts?

15 MR. MORRIS: Objection to the extent it calls for the  
16 conduct or knowledge of the Issuers.

17 THE COURT: Overruled. He can answer if he knows.

18 THE WITNESS: I don't believe so.

19 BY MR. RUKAVINA:

20 Q Had they, is that something that you would have expected  
21 them to inform the Funds of?

22 A Yes. The Funds would have received some type of  
23 notification if there was a new Advisor on the CLOs.

24 Q So, other than these two letters -- let me stop there.  
25 Did any discussion of trying to terminate these contracts

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1 basically cease with the sending of these two letters and the  
2 Debtor's responsive letters?

3 A That's my understanding, yes.

4 Q Okay. And we never did file a motion for lift stay. Can  
5 you explain to the judge why we didn't file a motion for  
6 relief from the stay?

7 A It's my understanding that the intent was that the  
8 management of the CLOs was going to be heard in conjunction  
9 with the confirmation hearing.

10 Q And do you recall when that confirmation hearing was  
11 originally set for?

12 A I believe it was supposed to start today. Or tomorrow.

13 Q Well, wasn't it earlier in January? Around January 11th?

14 A Uh, I -- I don't recall specifically.

15 MR. RUKAVINA: Mr. Vasek, if we could pull up the  
16 Form CLO agreement. What exhibit is that?

17 (Pause. Counsel confer.)

18 MR. RUKAVINA: No, that's not.

19 THE COURT: Can I ask what we're about to start  
20 doing?

21 MR. RUKAVINA: Eight.

22 THE COURT: Can I ask what we are about to start  
23 doing?

24 MR. RUKAVINA: Your Honor, I apologize. I'm trying  
25 to find one of the CLO portfolio management agreements. I'm

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1 trying to pull it up for you.

2 THE COURT: Okay.

3 MR. RUKAVINA: It should be in your binder.

4 THE COURT: All right. Well, --

5 MR. RUKAVINA: Where is it, Julian?

6 MR. VASEK: It should be 8.

7 MR. RUKAVINA: I'm sorry?

8 MR. VASEK: 8.

9 MR. RUKAVINA: Your Honor, it's Exhibit 8 in your  
10 binder.

11 THE COURT: Exhibit --

12 BY MR. RUKAVINA:

13 Q And Mr. Post, you have that in front of you, right?

14 MR. RUKAVINA: Mr. Vasek, if you'll go to Page 14,  
15 please. Section 14. Termination by the Issuer for Cause.

16 MR. VASEK: Okay.

17 MR. RUKAVINA: Your Honor, the contract speaks for  
18 itself, and I'm not about to read the contract to the Court.  
19 The Court can read. I want to ask him certain questions about  
20 this. And you'll note that the contract gives the requisite  
21 holders of voting preference shares certain rights.

22 MR. MORRIS: Your Honor, respectfully, the witness  
23 has testified that he hadn't seen any of these contracts for  
24 five or six years, until the lawyers asked him to look at it,  
25 and they told him which specific provisions to look at.

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1           The document does speak for itself. Counsel should just  
2           make it part of his closing argument. There's no evidence  
3           that there's a quote/unquote Form CLO Management Agreement.  
4           And I would just respectfully suggest that this is better  
5           saved for closing argument.

6           THE COURT: Yes. What are we going to do here? He  
7           did not seem like he was an expert on these CLOs in his  
8           earlier testimony. He hadn't read much of them until  
9           recently. So where are we going with this?

10           MR. RUKAVINA: Well, Your Honor, the question, again,  
11           is -- can you hear me? The question again is, Are we going to  
12           be enjoined from exercising any rights in the future, so I  
13           would like to take the witness through the importance from a  
14           regulatory perspective and a fiduciary perspective of some of  
15           these rights. If Your Honor thinks that that's for closing  
16           argument, that's fine. But I will note that that Your Honor  
17           allowed Mr. Morris for some forty minutes to read prior  
18           testimony into the record.

19           MR. MORRIS: I'm happy to respond if Your Honor needs  
20           me to.

21           THE COURT: Go ahead.

22           MR. MORRIS: There is a complete difference, Your  
23           Honor. To read statements against interest, to read defense's  
24           own sworn statements that they made at a prior proceeding, as  
25           opposed to trying to get a witness who has admitted that he's

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1 not familiar with these documents, to try to convince the  
2 Court that they said something that the witness doesn't have  
3 any personal knowledge or expertise about. It's completely  
4 different.

5 THE COURT: All right. I sustain the objection. You  
6 can make whatever argument you want in the closing arguments  
7 about whatever provisions of whichever CLO agreements justify  
8 actions. I guess that's where we're going.

9 MR. RUKAVINA: Then, if you could pull up Exhibit 78,  
10 and if Your Honor could turn to Exhibit 78.

11 THE COURT: All right.

12 MR. RUKAVINA: Is this a confidential -- Julian, what  
13 does it mean, it's confidential? 78. Is this confidential?

14 MR. VASEK: It says confidential on the --

15 MR. RUKAVINA: Your Honor, apparently this is a  
16 confidential document, so how does the Court want to proceed  
17 on this WebEx?

18 THE COURT: All right. We're stopping. We're  
19 stopping. We have protocols in place in this case, and people  
20 usually file motions to present things under seal or  
21 redactions. My patience is shot, so we're going to stop.  
22 Let's talk about where we go from here.

23 MR. MORRIS: If I may, Your Honor?

24 THE COURT: Yes.

25 MR. MORRIS: John Morris from Pachulski Stang --

1 THE COURT: Uh-huh.

2 MR. MORRIS: -- for the Debtor.

3 MR. RUKAVINA: We filed this under seal, right?

4 MR. MORRIS: We were --

5 MR. RUKAVINA: Oh, I thought we had.

6 MR. MORRIS: -- hoping that we would get this  
7 finished today, Your Honor, and the Debtor was really hoping  
8 to get a ruling before confirmation. But given all that's in  
9 front of us, including the contempt hearing next Friday, just  
10 a couple of days after the confirmation hearing, I think the  
11 Debtor at this point is prepared to agree, if it's okay with  
12 the Defendants' counsel, to push this to the following week,  
13 since the -- you know, with the understanding that everybody  
14 stipulate on the record that the TRO stays in place. And if  
15 we could have this particular motion heard, I guess, somewhere  
16 -- it's the week of February 8th, the Debtor would consent to  
17 that.

18 THE COURT: All right. Do we already have a --

19 MR. RUKAVINA: Your Honor, can the Court --

20 THE COURT: -- setting that week? Because I know we  
21 have confirmation, what, are we set for the 2nd, 3rd, and 4th?  
22 Three days next week.

23 MR. MORRIS: I believe -- yeah. I think it's just  
24 two, Your Honor. I think --

25 THE COURT: Okay.

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1 MR. MORRIS: -- confirmation is the 2nd and the 3rd,  
2 and then I think the 5th is the contempt hearing. I'm not  
3 aware, but I don't -- I don't profess to know the entirety of  
4 the calendar. I'm not aware of anything that's on for the  
5 following week.

6 THE COURT: Does it make sense to continue this to  
7 the 5th? Because the issues are so overlapping here. I feel  
8 like it's been a contempt hearing half of today, actually.

9 MR. MORRIS: Yeah.

10 THE COURT: So, shall we just set it for -- is it  
11 Friday, the 5th?

12 MR. MORRIS: It is.

13 THE COURT: At 9:30?

14 MR. MORRIS: And I think that's a great idea, yeah.  
15 Yeah.

16 THE COURT: What do you want to say about that, Mr.  
17 Rukavina?

18 MR. RUKAVINA: Thank you, Your Honor. We're fine  
19 with that.

20 Let me just point out, so that if the Court is impatient  
21 or frustrated, we did move Exhibit 78 to be filed under seal.  
22 The Court did enter an order allowing it to be filed under  
23 seal. So that the Court doesn't think that somehow we were  
24 negligent in that.

25 But February the 5th works for us.

1 THE COURT: Okay. All right. So I have an  
2 unredacted clean copy up here, which, if and when I admit it,  
3 we will put it under seal in our exhibit room, or I guess our  
4 electronic exhibit room.

5 So, we'll come back on the 5th at 9:30. But I am not -- I  
6 am not done. Yes, I am frustrated. Yes, I'm impatient. I  
7 have asked myself "Why are we here?" so many times today. Why  
8 are we here? I mean, I've had this conversation before. I  
9 mean, we had a, as you know, a very lengthy hearing on the  
10 motion for a TRO or preliminary injunction against Mr. Dondero  
11 personally. And I think it was Mr. Morris who said, it's a  
12 little bit like Groundhog Day. You know, that was actually a  
13 more flattering way of describing it than I might have. I  
14 might have said this is reminding me of Albert Einstein's  
15 definition of insanity. You all know what I'm talking about?  
16 When you're doing the same thing over and over again and  
17 expecting a different result.

18 And, you know, no offense, Mr. Dondero, if you're still  
19 there listening, but that's what it feels like to me. I mean,  
20 it is -- it's the same thing over and over again. And we've  
21 spent very, very, very little time talking about the January  
22 9th, 2020 corporate governance settlement agreement. Of  
23 course, it was mentioned extensively in the pleadings, at  
24 least by the Debtor. But, you know, I've heard all of this  
25 evidence today, and I'm going to hear more evidence,



1     apparently, on the 5th. But Paragraph -- was it 9? --  
2     Paragraph 9 of the January 9th, 2020 settlement agreement.  
3     The order directed Mr. Dondero not to "cause any related  
4     entity to terminate any agreements with the Debtor."

5             And, you know, I thought to myself as I was reading,  
6     preparing for this hearing, that, you know, I seem to remember  
7     those words meant so, so much to me. And then this reply  
8     brief was filed by the Debtor at 6:00 or 7:00 o'clock last  
9     night, and it gave an excerpt of the transcript, the hearing  
10    where I approved this corporate governance settlement  
11    agreement, and I said, that language is so important to me  
12    because of my history in the *Acis* case, I want it in the  
13    order. I don't even -- I don't want it merely in the term  
14    sheet, and then, of course, the order cross-references,  
15    approves the term sheet. I want that in the order. Because,  
16    you know, I knew, even with this highly-qualified independent  
17    board of directors, and even with this very sophisticated  
18    Creditors' Committee with very sophisticated professionals  
19    monitoring everything that happened, and having not just the  
20    monitoring rights but the standing to pursue things, I knew,  
21    even with this great system that had been negotiated in the  
22    January term sheet, there was the possibility of things  
23    happening through Dondero-controlled entities indirectly. And  
24    so that's why we had that Paragraph 9. So, --

25             (Interruption.)

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1 THE COURT: I don't know what that was I just heard,  
2 but someone needs to put me on mute.

3 So, I mean, we've heard a lot. We've heard a lot, but --

4 MR. DONDERO: Hello? Your Honor? Your Honor?

5 THE COURT: Okay. I --

6 MR. DONDERO: Hi. Jim Dondero.

7 THE COURT: Oh, okay. I'm still talking. I'm still  
8 talking. But I --

9 MR. DONDERO: Okay.

10 THE COURT: But I said --

11 MR. DONDERO: I'm sorry.

12 THE COURT: I said at the hearing on the preliminary  
13 injunction as to Mr. Dondero personally, do you remember what  
14 I said, I said life changed when you put your company in  
15 Chapter 11. And, you know, even if you had stayed on as  
16 president of the Debtor, life changed. Okay? Because you're  
17 a debtor-in-possession. You have to say, "Mother, may I?" to  
18 the Court. Creditors get to object to things. So things  
19 changed.

20 But things really, really, really changed, you know, they  
21 changed in October 2019, and then they changed dramatically in  
22 January 2020, when independent board members were put in place  
23 and you were taken out of management.

24 So, the reason I'm coming back to that concept is this:  
25 I've heard a lot about the preferred shareholders didn't like

1 the trades Mr. Seery was implementing, the sale of AVYA, the  
2 sale of SKY. They didn't like it. Well, I mean, I hate to  
3 say something flippant like tough luck, but really: Tough  
4 luck. Okay? We all know that with a company like this, with  
5 a company like Acis, it's complicated, right? Because you've  
6 got a fiduciary duty to your creditors to maximize value of  
7 the estate so creditors get paid in Chapter 11, right? But  
8 meanwhile, you know, you've got to have fiduciary duties, I  
9 don't know if it's directly to preferred shareholders or just  
10 to the CLOs. But whatever it is, you know, there may be  
11 differing views that individual preferred shareholders have.  
12 But Mr. Seery is in charge. The Debtor is in charge. You  
13 don't like it, I'm sorry, but he's in charge.

14 So, you know, I thought, am I going to come in here today  
15 and see all kinds of specific contractual references, where, I  
16 don't know, somehow you have an argument that you can control  
17 buys and sells? Of course, in this case, it would just be  
18 sells at this point. You know, no. I knew I wasn't going to  
19 see that. And I haven't.

20 So I don't know what I'm going to hear more on the 5th  
21 that is going to tilt me a different way, but right now, if I  
22 had to rule right now, this would be a total no-brainer to  
23 issue this preliminary injunction. Okay? I feel like it's  
24 been teed up almost like find Dondero in contempt, find these  
25 entities in contempt. What I'm here on today is whether I

1 should issue a preliminary injunction, and the December  
2 letters, the emails, the communications, they lead me to  
3 believe that this preliminary injunction is needed because  
4 someone doesn't understand that Mr. Seery is in charge and the  
5 preferred shareholders, the Funds, the Advisors, they don't  
6 have the ability to interfere with what he's doing in running  
7 the company.

8 And the threats of we're going to, you know, direct -- we  
9 may direct the CLO Issuer to terminate the Debtor: I mean,  
10 it's just -- there's no sound business justification for that.  
11 Okay? I don't know what we're doing, where we're going.

12 Mr. Dondero, I said to you in December, you know, I really  
13 wanted to encourage good-faith negotiations on your possible  
14 pot plan because I thought you wanted to save your baby. But  
15 the more I hear, the more I feel you're just trying to burn  
16 the house down. Okay? Maybe it's an either/or proposition  
17 with you: I'll either get my company back or I'll burn the  
18 house down. That's what it feels like. And I have no choice  
19 but to enter preliminary injunctions with this kind of  
20 behavior.

21 So, I'm very frustrated. I'm very frustrated. I don't  
22 know if anyone wants to say anything or we just end it on this  
23 frustrating note.

24 Mr. Rukavina, did you want to let your client speak, or  
25 no?

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1 MR. RUKAVINA: Your Honor?

2 THE COURT: Not your client.

3 MR. RUKAVINA: No, but --

4 THE COURT: The client representative.

5 MR. RUKAVINA: Your Honor, I take issue with what the  
6 Court has said, but we did file a motion yesterday to file a  
7 plan under seal. It is -- Mr. Dondero, can you mute your  
8 phone? The Court should have seen that by now. It is a pot  
9 plan with much more cash consideration. We have discussed it  
10 with the Debtor and the Committee. We are in earnest  
11 negotiations. I have no reason to believe or disbelieve that  
12 we're close to a settlement.

13 But recall what I said at the beginning. We asked the  
14 Debtor to continue this hearing. We said, You have a TRO that  
15 ends February the 15th. Why are you doing this? Well, the  
16 Debtor did it to smear Mr. Dondero on a very carefully crafted  
17 record, without telling you the other half of it. And when I  
18 tried to have Mr. Post explain it, opposing counsel won't let  
19 me even tell you our views. So there is a competing plan. We  
20 want to try --

21 THE COURT: You tried to get him to testify about  
22 comments to CFRs when he has shown no expertise whatsoever --

23 MR. RUKAVINA: That's fine.

24 THE COURT: -- to permit that.

25 MR. RUKAVINA: And I understand, Your Honor. I don't

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1 want -- Your Honor has made her evidentiary rulings. I'm not  
2 here to second-guess them.

3 I'm telling you that Mr. Dondero -- and more importantly,  
4 the other companies, *i.e.*, NexPoint -- we heard you loud and  
5 clear. We did not just send forward some cocktail-napkin term  
6 sheet. I spent the weekend and Friday preparing a  
7 comprehensive plan and disclosure statement. I hope that the  
8 Court will allow it to be filed under seal. Exclusivity has  
9 expired. I am asking to file it under seal only.

10 THE COURT: Tell me what utility that has. What  
11 utility does that have if you don't have one plan supporter?  
12 I mean, where are we going with this? I have invited, I have  
13 encouraged, I have directed good-faith negotiations with the  
14 Committee. If you don't have the Committee on board, what  
15 utility is there in allowing you to file a plan under seal?

16 MR. RUKAVINA: Well, if it's filed under seal, Your  
17 Honor, then, really, no one is going to be prejudiced or hurt.  
18 But we have not been told --

19 THE COURT: Then why --

20 MR. RUKAVINA: -- from the Committee --

21 THE COURT: Then why are we doing it? Help me to  
22 understand the strategy. Maybe I'm just naïve.

23 MR. RUKAVINA: Your Honor, there is no strategy and  
24 the Court is not naïve. Pursuant to an agreement of the  
25 Committee and the Debtor, I sent that draft plan to them over

1 the weekend, and they agree it's not solicitation. It has not  
2 gone to the creditors. No one has seen it.

3 The reason why we sent it to the Committee and the Debtor  
4 was to foster ongoing negotiations. We had negotiations last  
5 night. The Committee and the Debtor had negotiations last  
6 night. We've been promised a response in the next couple of  
7 days, and we have a follow-up meeting scheduled for Thursday.

8 The reason why I wanted the plan filed under seal is so  
9 that there is a record of what is being discussed so the U.S.  
10 Trustee can see it, if she wants to, and so that other key  
11 constituents, if they want to or have a reason to, can see it.

12 But I agree with you: That plan ain't going nowhere if we  
13 don't have some material creditor support. We won't know that  
14 for a couple more days.

15 So my only point in saying this to Your Honor is that we  
16 are working earnestly, we are increasing our consideration, we  
17 have heard you loud and clear, and all the parties are  
18 negotiating.

19 Again, we did not want this hearing to happen today  
20 because it's a step backwards from negotiations, not a step  
21 forward. Thank you.

22 MR. POMERANTZ: Your Honor, may I be heard?

23 THE COURT: Go ahead, Mr. Pomerantz. Go ahead.

24 MR. POMERANTZ: Mr. Rukavina sent us over the plan,  
25 and we had no problem with it being sent to the Committee. He

1 then sent us over the motion. Now, aside from the fact that  
2 the motion contains some statements which the Debtor strongly  
3 disagrees with, with respect to the ability of administrative  
4 claims or other claims to be assumed, but putting that aside,  
5 we were concerned that the filing of a plan on the docket,  
6 unsealed, would be a distraction.

7 Having said that, we also saw utility in the plan being  
8 put in the hands of the largest creditors so that they can  
9 evaluate what was being proposed.

10 We told Mr. Rukavina we have no problem if the plan was  
11 filed under seal, stayed under seal until after confirmation,  
12 and then, in exchange, we would agree to something that we  
13 don't think we had to agree: That he could send the plan to  
14 UBS, to Acis, to Redeemer, to Meta-e, to HarbourVest, and  
15 Daugherty. Essentially, all the players in the case. Mr.  
16 Rukavina said he would consider that, and then just filed his  
17 motion.

18 We don't have any problem with him doing that still,  
19 sending it to the six creditors so they can look at it. We  
20 don't think it should be unsealed on the docket.

21 And the discussion of status of negotiations, Your Honor,  
22 as we've told you many times before, we would love there to be  
23 a plan. We would love there to be support of a plan. Mr.  
24 Dondero asked to approach the board and speak to the board  
25 yesterday. We heard him out. The plan essentially is the



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1 same document and the same term sheet, I think, that has been  
2 floating around for several weeks.

3 Having said that, we said, We are not going to stand in  
4 the way of Mr. Dondero and the Creditors' Committee. And if  
5 the Creditors' Committee and Mr. Dondero have a meeting of the  
6 minds, if there's any desire of them to have more time, we  
7 would be supportive of it. I'll let Mr. Clemente respond as  
8 to whether there's any negotiation -- (echoing.) But when Mr.  
9 Rukavina said that last night there were negotiations between  
10 the Debtor and Mr. Dondero, that's just not accurate. We, we  
11 look at ourselves as the honest broker. But at the end of the  
12 day, as Your Honor has remarked many times throughout this  
13 case and just remarked a few moments ago, unless the  
14 Creditors' Committee supports this plan, it is DOA. And we  
15 have communicated that several times to Mr. Dondero and his  
16 team.

17 So, I just wanted to speak to correct the record. We're,  
18 again, supportive of a plan if there can be one. But at this  
19 point, we haven't seen anything, the parties coming any closer  
20 or any more negotiations, and we just have to get confirmed  
21 sooner rather than later (echoing), prepared to go forward.

22 MR. CLEMENTE: Your Honor, it's Matt Clemente at  
23 Sidley. I'm happy to make some comments to Your Honor, --

24 THE COURT: Okay.

25 MR. CLEMENTE: -- if you -- if you wish.

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1 THE COURT: Please do.

2 MR. CLEMENTE: I think it's fair to say that the  
3 Committee believes the plan needs to go forward next week,  
4 Your Honor. We have, of course, taken your direction very  
5 seriously, and we very seriously consider all of the  
6 communications we get from Mr. Dondero. There exists still a  
7 material value gap in what is being offered under Mr.  
8 Dondero's plan, as well as a quality of the value.

9 So, Your Honor, while we continue to consider the plan and  
10 what we receive from Mr. Dondero, I do not want to leave Your  
11 Honor with the impression that the Committee feels like we are  
12 close to an agreement, and we anticipate going forward with  
13 the plan next week.

14 That being said, we of course will respond to Mr. Dondero  
15 as we review the plan, but as I sit here today, I don't  
16 believe that we are close. But, again, the Committee will  
17 continue to review it, and we should anticipate going forward  
18 with confirmation next week.

19 THE COURT: All right. So, you don't have any  
20 problem with the plan being filed under seal?

21 MR. CLEMENTE: Your Honor, we -- the Committee does  
22 have the plan, and I guess I'm not sure I'd see the point of  
23 having it filed it under seal. I think it serves to confuse  
24 issues. But, you know, hearing what Your Honor said earlier,  
25 I don't think we need to continue to bring different fights in

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1 front of Your Honor, so I'm not sure that I see necessarily  
2 the harm in a plan being filed under seal, again, with the  
3 idea that, you know, why bring -- continue to bring fights to  
4 Your Honor if we don't need to?

5 THE COURT: All right.

6 MR. CLEMENTE: But what I do think is clear, Your  
7 Honor, that I do want to express to you is that the  
8 representations in that motion the Committee do not believe  
9 are accurate. We do not believe that there's been a  
10 significant value increase. We do not believe that we are  
11 close. That would be the point that I would make in  
12 connection with a response to that motion. So, but in terms  
13 of filing it under seal, I'm not sure the Committee has a  
14 strong feeling that that should not happen.

15 THE COURT: Yes.

16 MR. RUKAVINA: And Your Honor, very quickly, --

17 THE COURT: The words --

18 MR. RUKAVINA: -- I never represented that we're  
19 close.

20 THE COURT: The words I remember in the motion were  
21 significant value increase, something to that effect. But  
22 also more recovery than the plan that's on file.

23 (Echoing.)

24 THE COURT: So I was kind of darn curious to see it  
25 just for that.

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1 MR. RUKAVINA: And Your Honor, obviously, because  
2 there's many people on this call, I don't want to run afoul of  
3 any kind of procedures. I'd be happy to walk Your Honor  
4 through, but I can't, not with 90 people on the call.

5 THE COURT: Right.

6 MR. RUKAVINA: I did not represent that we're close  
7 to a settlement in that motion, and I did not send the plan to  
8 those people that Mr. Pomerantz mentioned.

9 So, right now, the Committee, the Debtor, and the  
10 employees, because they requested it after Mr. Pomerantz  
11 approved it, have what I would like to file under seal. I'm  
12 not suggesting here today that it go any farther than being  
13 filed under seal, but at least it be there for some record.

14 THE COURT: Well, didn't you -- did I dream this? --  
15 didn't you say that there would be something like 48 hours for  
16 people to object or then it would be filed not under seal?  
17 Did I dream that?

18 MR. RUKAVINA: Your Honor, that was my proposal, and  
19 Your Honor can certainly reject that. Mr. Pomerantz asked  
20 that the plan should never be unsealed pending confirmation of  
21 the Debtor's plan. I have a different proposal. Your Honor  
22 will rule and we'll comply with Your Honor's ruling.

23 MR. DONDERO: Jim Dondero here. Can I have two --  
24 two quick minutes and just say two quick things?

25 THE COURT: Well, only if your counsel permits it. I

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1 don't want to get in --

2 MR. RUKAVINA: I just don't -- yeah. Mr. Dondero, if  
3 you would please just not describe the substance, the economic  
4 substance of our proposed plan, not with so many people on the  
5 line.

6 MR. DONDERO: Sure. I just want to make two quick  
7 points. I couldn't apologize more for taking the Court's time  
8 today. It wasn't our 'druthers. You heard, I think, at least  
9 five or six hours from the Debtor. You never once heard them  
10 say that their activities didn't violate the Advisers Act.  
11 And they never once said that violating the Advisers Act  
12 wasn't a big deal. You know, they never said that.

13 What they tried to say, oh, we have these other contracts.  
14 Let's try and turn this into an injunction against Dondero  
15 interfering. But they never -- they never denied that Dondero  
16 and the NexPoint team was trying to do what was in the best  
17 interest of investors and that they had violated the Advisers  
18 Act.

19 I think, in normal course, each side would have had an  
20 expert and you could have opined on whether it was a violation  
21 of the Advisers Act, but they know they did something wrong so  
22 they're trying to make it an injunction against me. Okay.  
23 That's all I have to say about that point.

24 As far as the alternative plan, Your Honor, we heard you  
25 loud and clear. And the economics that we put forward, I

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1 can't talk them about specifically, but they're at least 20  
2 percent better than what the Debtor has put forward as far as  
3 a plan. And what we put forward is elegant, it's simpler, it  
4 treats the employees fairly, it gives the business continuity,  
5 it gives investors continuity, and it's not just a harsh,  
6 punitive liquidation that's going to end up in a myriad of  
7 litigation.

8 We're paying a premium, it's a capitulation price, to try  
9 and get to some kind of settlement. And I encourage you to  
10 look at it. It's elegant. It's straightforward. It's  
11 simple. And now that you've encouraged and gotten us up to a  
12 number that's well in excess of the Debtor, maybe a little  
13 pressure on other people to treat employees fairly, maybe not  
14 liquidate a business that's important in Dallas, that has been  
15 a big business for a number of years, doing enormous good  
16 things for a lot of people.

17 You know, we went into bankruptcy with \$450 million of  
18 assets and almost no debt. And we've been driven into the  
19 ground by the process. And then the plan is to just harshly  
20 liquidate going forward. I -- I -- it's crazy. I don't know  
21 what else to do to stop the train other than what we've  
22 offered.

23 THE COURT: All right. Well, I hear what you're  
24 saying, and I do, just because -- I don't know if you left the  
25 room or not, but we did have discussion of Section 206 of the

251

1 Investment Advisers Act today. It was put on the screen. Mr.  
2 Post was asked what was unlawful as far as what had happened  
3 here, what was going on here, what was fraudulent, deceptive,  
4 or manipulative, in parsing through the words of the statute.  
5 And he said Mr. Seery engaged in deceptive acts because he  
6 wasn't trying to maximize value. Okay? I'm not an expert on  
7 the Investment Advisers Act, but I know that that was not a  
8 deceptive act.

9 And so I'll allow the plan to be filed under seal, but  
10 it's not going to be unsealed absent an order of the Court.  
11 Okay? So we'll just leave it at that for now. And while I  
12 still encourage good-faith negotiations here, I've said it  
13 umpteen times, where you're tired of the cliché, probably:  
14 The train is leaving the station. And if you want the Court  
15 to have patience in the process and if you want the parties to  
16 cooperate in good faith, it might help if we didn't have  
17 things like Dugaboy and Get Good Trust filing a motion for an  
18 examiner 15 months into the case.

19 I mean, it feels to me, Mr. Dondero, whether I'm right or  
20 wrong, that it's like you've got a twofold approach here: I  
21 either get the company back or I burn the house down. And I'm  
22 telling you right now, if we don't have agreements, --

23 MR. DONDERO: That's not true.

24 THE COURT: -- if we don't have agreements and we  
25 come back on the 5th for a continuation of this hearing and a

1 motion to hold you in contempt, you know, I'm leaning right  
2 now, based on what I've heard so far, and I know I haven't  
3 heard everything, but I'm leaning right now towards finding  
4 contempt and shifting a whole bundle of attorneys' fees.  
5 That, to me, seems like the likely place we're heading.

6 I mean, I commented at the December hearing on the  
7 preliminary injunction against you personally that it had been  
8 like a \$250,000 hearing, I figured, okay, just guesstimating  
9 everybody's billable rate times the hours we spent. Well,  
10 here we were again, and I know we've got all this time outside  
11 the courtroom preparing, taking depositions. I mean, what  
12 else is a judge to think except, by God, let's drive up  
13 administrative expenses as much as we can; if we can't win,  
14 we're going to go down fighting? That's what this looks like.  
15 Okay? So if it's not really what's going on, then you've got  
16 to work hard to change my perceptions at this point.

17 MR. RUKAVINA: Your Honor, I hear everything what  
18 you're saying, and I'm going to discuss it very bluntly with  
19 my clients. But we're being asked not to exercise contract  
20 rights in the future. This is not a contempt hearing. And  
21 Your Honor, we did ask and offered the estate a million  
22 dollars, found money, plus to waive almost all our plan  
23 objections, if they would just put this case on pause for 30  
24 days.

25 So we are trying. We are trying creative solutions here.



253

1 We know that the train is leaving. We've put our money where  
2 our mouth is. We will continue trying. But Your Honor, this  
3 is not a contempt proceeding, and my clients are not Mr.  
4 Dondero. You've heard they're independent boards.

5 MR. POMERANTZ: I can't leave that last comment  
6 without a response. Yes, there was an offer of a million  
7 dollars, by an entity that owes the estate multiples of that.  
8 So they are offering to pay us something that they already owe  
9 us. So Mr. Rukavina continues try to do this. We will not  
10 stand for it.

11 MR. RUKAVINA: That is not a fair statement, sir. I  
12 misrepresented nothing. We were offering you a million  
13 dollars, with no conditions, earned upon receipt, with no  
14 credit, no deduction for any of our liability. So you're free  
15 to say no, sir, but you're not going to tell the judge that I  
16 misrepresented something.

17 THE COURT: All right.

18 MR. POMERANTZ: Should tell the Court --

19 THE COURT: You know what?

20 MR. POMERANTZ: -- that that entity owed the Debtor.

21 THE COURT: You know what? You know what? I am more  
22 focused on, Mr. Rukavina, your comment that this Court can't  
23 enjoin your clients from exercising contractual rights when,  
24 again, in January of 2020, the representation was made and it  
25 was ordered, "Mr. Dondero shall not cause any related entity

1 to terminate any agreements with the Debtor." Okay? That was  
2 -- go back and look at the transcript. That was so meaningful  
3 to me.

4 We were facing a possible trustee. And that's what I did  
5 in the Acis case. Okay? I had a Chapter 11 trustee. And it  
6 was not a perfect fit, to be sure. But it is where we were  
7 heading in this case, had the lawyers and parties not  
8 negotiated what they did. That was a very important  
9 provision, convincing me that, you know what, I think the  
10 structure they've got will be better than a trustee. And it  
11 has, for the most part. But the fees have gone out the roof,  
12 and I lay that at the feet of Mr. Dondero, for the most part.  
13 Okay? We have a bomb thrown every five minutes by either him  
14 personally or the Dugaboy or the Get Good Trust or the Funds  
15 or the Advisors or I don't know who else. Okay?

16 So the train is leaving the station, unless you all come  
17 to me and say, okay, we've maybe got a -- Mr. Pomerantz's word  
18 -- grand solution here. Okay? If you get there in the next  
19 few days, wonderful. Okay? But I don't know what else to say  
20 except I'm tired of the carpet-bombing, and if I had to rule  
21 this minute, there would be a huge amount of fee-shifting for  
22 what we went through today, for what we went through in  
23 December, for the restriction motion that, after I called it  
24 frivolous, the lawyers were sending letters pretty much  
25 regurgitating the same arguments. All right. So, not a happy

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1 camper.

2 But upload your order on the motion to seal the plan.

3 And, again, it's not going to be unsealed absent a further  
4 order of the Court. And if you all come to me next week and  
5 say, hey, we've got something in the works here, okay, I'll  
6 consider unsealing it and letting you go down a different  
7 path. But I'm not naïve. I feel like this is just more  
8 burning the house down, maybe. I don't know. I hope I'm  
9 wrong. I hope I'm wrong. But all right. So I guess we'll  
10 see you next week.

11 MR. POMERANTZ: Thank you, Your Honor.

12 MR. MORRIS: Thank you, Your Honor.

13 THE COURT: All right. We're adjourned.

14 MR. RUKAVINA: Thank you, Your Honor.

15 THE CLERK: All rise.

16 (Proceedings concluded at 6:08 p.m.)

17 --oOo--

18

19

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from  
22 the electronic sound recording of the proceedings in the  
above-entitled matter.

23 **/s/ Kathy Rehling**

**01/28/2021**

24

25 Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

Date

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## EXHIBIT 30

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

In Re: ) **Case No. 19-34054-sgj-11**  
 ) Chapter 11  
 )  
HIGHLAND CAPITAL ) Dallas, Texas  
MANAGEMENT, L.P., ) Monday, February 8, 2021  
 ) 9:00 a.m. Docket  
Debtor. )  
 ) BENCH RULING ON CONFIRMATION  
 ) HEARING [1808] AND AGREED  
 ) MOTION TO ASSUME [1624]  
 )

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

For the Debtor: Jeffrey Nathan Pomerantz  
PACHULSKI STANG ZIEHL & JONES, LLP  
10100 Santa Monica Blvd.,  
13th Floor  
Los Angeles, CA 90067-4003  
(310) 277-6910

For the Official Committee of Unsecured Creditors: Matthew A. Clemente  
SIDLEY AUSTIN, LLP  
One South Dearborn Street  
Chicago, IL 60603  
(312) 853-7539

For James Dondero: D. Michael Lynn  
John Y. Bonds, III  
Bryan C. Assink  
BONDS ELLIS EPPICH SCHAFFER  
JONES, LLP  
420 Throckmorton Street,  
Suite 1000  
Fort Worth, TX 76102  
(817) 405-6900

For Get Good Trust and Dugaboy Investment Trust: Douglas S. Draper  
HELLER, DRAPER & HORN, LLC  
650 Poydras Street, Suite 2500  
New Orleans, LA 70130  
(504) 299-3300

1 APPEARANCES, cont'd.:

2 For Certain Funds and Davor Rukavina  
3 Advisors: MUNSCH, HARDT, KOPF & HARR  
4 500 N. Akard Street, Suite 3800  
Dallas, TX 75201-6659  
(214) 855-7587

5 For Certain Funds and A. Lee Hogewood, III  
6 Advisors: K&L GATES, LLP  
4350 Lassiter at North Hills  
7 Avenue, Suite 300  
Raleigh, NC 27609  
8 (919) 743-7306

9 Recorded by: Michael F. Edmond, Sr.  
10 UNITED STATES BANKRUPTCY COURT  
11 1100 Commerce Street, 12th Floor  
Dallas, TX 75242  
(214) 753-2062

12 Transcribed by: Kathy Rehling  
13 311 Paradise Cove  
Shady Shores, TX 76208  
(972) 786-3063

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25 Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.



1 DALLAS, TEXAS - FEBRUARY 8, 2021 - 9:08 A.M.

2 THE COURT: Please be seated.

3 (Beeping.)

4 THE COURT: Someone needs to turn off their whatever.

5 All right. Good morning. This is Judge Jernigan, and we  
6 have scheduled today a bench ruling regarding the Debtor's  
7 plan that we had a confirmation trial on last week. This is  
8 Highland Capital Management, LP, Case No. 19-34054.

9 Let me first make sure we've got Debtor's counsel on the  
10 line. Do we have --

11 MR. POMERANTZ: Yes.

12 THE COURT: -- Mr. Pomerantz?

13 MR. POMERANTZ: Yes, Your Honor. Good morning, Your  
14 Honor. Jeff Pomerantz; Pachulski Stang Ziehl & Jones; on  
15 behalf of the Debtor.

16 THE COURT: Okay. Good morning. Do we have the  
17 Creditors' Committee on the phone?

18 MR. CLEMENTE: Good morning, Your Honor. Matthew  
19 Clemente of Sidley Austin on behalf of the Creditors'  
20 Committee.

21 THE COURT: Good morning. All right. We had various  
22 Objectors. Do we have Mr. Dondero's counsel on the phone?

23 MR. LYNN: Yes, Your Honor. Michael Lynn, together  
24 with John Bonds and Bryan Assink, for Jim Dondero.

25 THE COURT: Good morning. For the Trusts, the

1 Dugaboy and Get Good Trusts, do we have Mr. Draper?

2 MR. DRAPER: Yes. Douglas Draper is on the line,  
3 Your Honor.

4 THE COURT: Good morning. Now, for what I'll call  
5 the Funds and Advisor Objectors, do we have Mr. Rukavina and  
6 your crew on the line?

7 MR. RUKAVINA: Davor Rukavina. And Lee Hogewood is  
8 also on the line.

9 THE COURT: All right. Good morning to you. All  
10 right. And we had objections pending from the U.S. Trustee as  
11 well. Do we have the U.S. Trustee on the line?

12 (No response.)

13 THE COURT: All right. If you're appearing, you're  
14 on mute. We're not hearing you.

15 All right. Well, we have lots of other folks. I don't  
16 mean to be neglectful of them, but we're going to get on with  
17 the ruling this morning. This is going to take a while. This  
18 is a complex matter, so it should take a while.

19 All right. Before the Court, of course, for consideration  
20 is the Debtor's Fifth Amended Plan, first filed on November  
21 24, 2020, as later modified on or around January 22, 2021,  
22 with more amendments filed on or around February 1, 2021. The  
23 Court will hereinafter refer to this as the "Plan."

24 The parties refer to the Plan as a monetization plan  
25 because it involves the gradual wind-down of the Debtor's

1 assets and certain of its funds over time, with the  
2 Reorganized Debtor continuing to manage certain other funds  
3 for a while, under strict governance and monitoring, and a  
4 Claimants Trust will receive the proceeds of that process,  
5 with the creditors receiving an interest in that trust. There  
6 is also anticipated to be Litigation Sub-Trust established for  
7 the purpose of pursuing certain avoidance or other causes of  
8 action for the benefit of creditors.

9 The recovery for general unsecured creditors is estimated  
10 now at 71 percent.

11 The Plan was accepted by 99.8 percent of the dollar amount  
12 of voting creditors in Class 8, the general unsecured class,  
13 but as to numerosity, a majority of the class of general  
14 unsecured creditors did not vote in favor of the plan.  
15 Specifically, 27 claimants voted no and 17 claimants voted  
16 yes. All but one of the rejecting ballots were cast by  
17 employees who, according to the Debtor, are unlikely to have  
18 allowed claims because they are asserted for bonuses or other  
19 compensation that will not become due.

20 Meanwhile, in a convenience class, Class 7, of general  
21 unsecured claims under one million dollars, one hundred  
22 percent of the 16 claimants who chose to vote in that class  
23 chose to accept the Plan.

24 Because of the rejecting votes in Class 8, and because of  
25 certain objections to the Plan, the Court heard two full days

1 of evidence, considering testimony from five witnesses and  
2 thousands of pages of documentary evidence, in considering  
3 whether to confirm the Plan pursuant to Sections 1129(a) and  
4 (b) of the Bankruptcy Code.

5 The Court finds and concludes that the Plan meets all of  
6 the relevant requirements of Sections 1123, 1124, and 1129 of  
7 the Code, and other applicable provisions of the Bankruptcy  
8 Code, but is issuing this detailed ruling to address certain  
9 pending objections to the Plan, including but not limited to  
10 objections regarding certain Exculpations, Releases, Plan  
11 Injunctions, and Gatekeeping Provisions of the Plan.

12 The Court reserves the right to amend or supplement this  
13 oral ruling in more detailed findings of fact, conclusions of  
14 law, and an Order.

15 First, by way of introduction, this case is not your  
16 garden-variety Chapter 11 case. Highland Capital Management,  
17 LP is a multibillion dollar global investment advisor,  
18 registered with the SEC pursuant to the Investment Advisers  
19 Act of 1940. It was founded in 1993 by James Dondero and Mark  
20 Okada. Mr. Okada resigned from his role with Highland prior  
21 to the bankruptcy case being filed. Mr. Dondero was in  
22 control of the Debtor as of the day it filed bankruptcy, but  
23 agreed to relinquish control of it on or about January 9,  
24 2020, pursuant to an agreement reached with the Official  
25 Unsecured Creditors' Committee, which will be described later.

1           Although Mr. Dondero remained on as an unpaid employee and  
2 portfolio manager with the Debtor after January 9, 2020, his  
3 employment with the Debtor terminated on October 9, 2020. Mr.  
4 Dondero continues to work for and essentially control numerous  
5 nondebtor companies in the Highland complex of companies.

6           The Debtor is headquartered in Dallas, Texas. As of the  
7 October 2019 petition date, the Debtor employed approximately  
8 76 employees.

9           Pursuant to various contractual arrangements, the Debtor  
10 provides money management and advisory services for billions  
11 of dollars of assets, including CLOs and other investments.  
12 Some of these assets are managed pursuant to shared services  
13 agreements with a variety of affiliated entities, including  
14 other affiliated registered investment advisors. In fact,  
15 there are approximately 2,000 entities in the Byzantine  
16 complex of companies under the Highland umbrella.

17           None of these affiliates of Highland filed for Chapter 11  
18 protection. Most, but not all, of these entities are not  
19 subsidiaries, direct or indirect, of Highland. And certain  
20 parties in the case preferred not to use the term "affiliates"  
21 when referring to them. Thus, the Court will frequently refer  
22 loosely to the so-called, in air quotes, "Highland complex of  
23 companies" when referring to the Highland enterprise. That's  
24 a term many of the lawyers in the case use.

25           Many of the companies are offshore entities, organized in

1 such faraway jurisdictions as the Cayman Islands and Guernsey.

2 The Debtor is privately owned 99.5 percent by an entity  
3 called Hunter Mountain Investment Trust; 0.1866 percent by the  
4 Dugaboy Investment Trust, a trust created to manage the assets  
5 of Mr. Dondero and his family; 0.0627 percent by Mark Okada,  
6 personally and through family trusts; and 0.25 percent by  
7 Strand Advisors, Inc., the general partner.

8 The Debtor's primary means of generating revenue has  
9 historically been from fees collected for the management and  
10 advisory services provided to funds that it manages, plus fees  
11 generated for services provided to its affiliates.

12 For additional liquidity, the Debtor, prior to the  
13 petition date, would sell liquid securities in the ordinary  
14 course, primarily through a brokerage account at Jefferies,  
15 LLC. The Debtor would also, from time to time, sell assets at  
16 nondebtor subsidiaries and distribute those proceeds to the  
17 Debtor in the ordinary course of business.

18 The Debtor's current CEO, James Seery, credibly testified  
19 that the Debtor was "run at a deficient for a long time and  
20 then would sell assets or defer employee compensation to cover  
21 its deficits." This Court cannot help but wonder if that was  
22 necessitated because of enormous litigation fees and expenses  
23 that Highland was constantly incurring due to its culture of  
24 litigation, as further addressed hereafter.

25 Highland and this case are not garden-variety for so many

1 reasons. One is the creditor constituency. Highland did not  
2 file bankruptcy because of some of the typical reasons a large  
3 company files Chapter 11. For example, it did not have a  
4 large asset-based secured lender with whom it was in default.  
5 It only had relatively insignificant secured indebtedness  
6 owing to Jefferies, with whom it had a brokerage account, and  
7 one other entity called Frontier State Bank.

8 Highland did not have problems with trade vendors or  
9 landlords. It did not suffer any type of catastrophic  
10 business calamity. In fact, it filed Chapter 11 six months  
11 before the COVID-19 pandemic was declared. The Debtor filed  
12 Chapter 11 due to a myriad of massive unrelated business  
13 litigation claims that it was facing, many of which had  
14 finally become liquidated or were about to become liquidated  
15 after a decade or more of contentious litigation in multiple  
16 fora all over the world.

17 The Unsecured Creditors' Committee in this case has  
18 referred to the Debtor under its former chief executive, Mr.  
19 Dondero, as a serial litigator. This Court agrees with that  
20 description. By way of example, the members of the Creditors'  
21 Committee and their history of litigation with the Debtor and  
22 others in the Highland complex are as follows:

23 First, the Redeemer Committee of the Highland Crusader  
24 Fund, which I'll call the Redeemer Committee. This Creditors'  
25 Committee member obtained an arbitration award against the

Debtor of more than \$190 million, inclusive of interest, approximately five months before the petition date from a panel of the American Arbitration Association. It was on the verge of having that award confirmed by the Delaware Chancery Court immediately prior to the petition date, after years of disputes that started in late 2008 and included legal proceedings in Bermuda. This creditor's claim was settled during the bankruptcy case in the amount of approximately \$137.7 million. The Court is omitting various details and aspects of that settlement.

The second Creditors' Committee member, Acis Capital Management, LP, which was formerly in the Highland complex of companies but was not affiliated with Highland as of the petition date. This UCC member and its now-owner, Josh Terry, were involved in litigation with Highland dating back to 2016. Acis was forced into an involuntary bankruptcy in the Bankruptcy Court for the Northern District of Texas, Dallas Division, by Josh Terry, who was a former Highland portfolio manager, in 2018 after Josh Terry obtained an approximately \$8 million arbitration award and judgment against Acis that was issued by a state court in Dallas County, Texas. Josh Terry was ultimately awarded the equity ownership of Acis by the Dallas Bankruptcy Court in the Acis bankruptcy case.

Acis subsequently asserted a multimillion dollar claim against Highland in the Dallas Bankruptcy Court for Highland's



1 alleged denuding of Acis in fraud of its creditors, primarily  
2 Josh Terry.

3 The litigation involving Acis and Mr. Terry dates back to  
4 mid-2016, and has continued on, with numerous appeals of  
5 bankruptcy court orders, including one appeal still pending at  
6 the United States Court of Appeals for the Fifth Circuit.

7 There was also litigation involving Josh Terry and Acis in  
8 the Royal Court of the Island of Guernsey and in a court in  
9 New York.

10 The Acis claim was settled during this bankruptcy case in  
11 court-ordered mediation for approximately \$23 million. Other  
12 aspects and details of this settlement are being omitted.

13 Now, the third Creditors' Committee member, UBS  
14 Securities. It's a creditor who filed a proof of claim in the  
15 amount of \$1,039,000,000 in the Highland case. Yes, over one  
16 billion dollars. The UBS claim was based on the amount of a  
17 judgment that UBS received from a New York state court in 2020  
18 after a multi-week bench trial which had occurred many months  
19 earlier on a breach of contract claim against other entities  
20 in the Highland complex. UBS alleged that the Debtor should  
21 be liable for the judgment. The UBS litigation related to  
22 activities that occurred in 2008. The litigation involving  
23 UBS and Highland and its affiliates was pending for more than  
24 a decade, there having been numerous interlocutory appeals  
25 during its history.

1       The Debtor and UBS recently announced a settlement of the  
2 UBS claim, which came a few months after court-ordered  
3 mediation. The settlement is in the amount of \$50 million as  
4 a general unsecured claim, \$25 million as a subordinated  
5 claim, and \$18 million of cash coming from a nondebtor entity  
6 in the Highland complex known as Multistrat. Other aspects of  
7 this settlement are being omitted.

8       The fourth and last Creditors' Committee member is Meta-e  
9 Discovery. It is a vendor who happened to supply litigation  
10 and discovery-related services to the Debtor over the years.  
11 It had unpaid invoices on the petition date of more than  
12 \$779,000.

13       It is fair to say that the members of the Creditors'  
14 Committee in this case all have wills of steel. They fought  
15 hard before and during the bankruptcy case. The members of  
16 the Creditors' Committee are highly sophisticated and have had  
17 highly sophisticated professionals representing them. They  
18 have represented their constituency in this case as  
19 fiduciaries extremely well.

20       In addition to these Creditors Committee members, who were  
21 all embroiled in years of litigation with Highland and its  
22 affiliates in various ways, the Debtor has been in litigation  
23 with Patrick Daugherty, a former limited partner and employee  
24 of Highland, for many years in both Delaware and Texas state  
25 courts. Patrick Daugherty filed a proof of claim for "at

1 least \$37.4 million" relating to alleged breached employment-  
2 related agreements and for the tort of defamation arising from  
3 a 2017 press release posted by the Debtor.

4 The Debtor and Patrick Daugherty recently announced a  
5 settlement of the Patrick Daugherty claim in the amount of  
6 \$750,000 cash on the effective date, an \$8.25 million general  
7 unsecured claim, and a \$2.75 million subordinated claim.  
8 Other aspects and details of this settlement are being  
9 omitted.

10 Additionally, an entity known as HarbourVest, who invested  
11 more than \$70 million with an entity in the Highland complex,  
12 asserted a \$300 million proof of claim against Highland,  
13 alleging, among other things, fraud and RICO violations. The  
14 HarbourVest claim was settled during the bankruptcy case for a  
15 \$45 million general unsecured claim and a \$35 million junior  
16 claim.

17 Other than these claims just described, most of the other  
18 claims in this case are claims asserted against the Debtor by  
19 other entities in the Highland complex, most of which entities  
20 the Court finds to be controlled by Mr. Dondero; claims of  
21 employees who believe that they are entitled to large bonuses  
22 or other types of deferred compensation; and claims of  
23 numerous law firms that did work for Highland and were unpaid  
24 for amounts due to them on the petition date.

25 Yet another reason this is not your garden-variety Chapter

11 case is its postpetition corporate governance structure. Highland filed bankruptcy October 16, 2019. Contentiousness with the Creditors' Committee began immediately, with first the Committee's request for a change of venue from Delaware to Dallas, and then a desire by the Committee and the U.S. Trustee for a Chapter 11 or 7 trustee to be appointed due to concerns over and distrust of Mr. Dondero and his numerous conflicts of interest and alleged mismanagement or worse.

After many weeks of the threat of a trustee lingering, the Debtor and the Creditors' Committee negotiated and the Court approved a corporate governance settlement on January 9, 2020 that resulted in Mr. Dondero no longer being an officer or director of the Debtor or of its general partner, Strand.

As part of the court-approved settlement, three eminently-qualified Independent Directors were chosen by the Creditors' Committee and engaged to lead Highland through its Chapter 11 case. They were James Seery, John Dubel, and Retired Bankruptcy Judge Russell Nelms. They were technically the Independent Directors of Strand, the general partner of the Debtor. Mr. Dondero had previously been the sole director of Strand, and thus the sole person in ultimate control of the Debtor.

The three independent board members' resumes are in evidence. James Seery eventually was named CEO of the Debtor. Suffice it to say that this changed the entire trajectory of

1 the case. This saved the Debtor from a trustee. The Court  
2 trusted the new directors. The Creditors' Committee trusted  
3 them. They were the right solution at the right time.

4 Because of the unique character of the Debtor's business,  
5 the Court believed this solution was far better than a  
6 conventional Chapter 7 or 11 trustee. Mr. Seery, in  
7 particular, knew and had vast experience at prominent firms  
8 with high-yield and distressed investing similar to the  
9 Debtor's business. Mr. Dubel had 40 years of experience  
10 restructuring large, complex businesses and serving on their  
11 boards of directors in this context. And Retired Judge Nelms  
12 had not only vast bankruptcy experience but seemed  
13 particularly well-suited to help the Debtor maneuver through  
14 conflicts and ethical quandaries.

15 By way of comparison, in the Chapter 11 case of Acis, the  
16 former affiliate of Highland that this Court presided over two  
17 or three years ago, which company was much smaller in size and  
18 scope than Highland, managing only five or six CLOs, a Chapter  
19 11 trustee was elected by the creditors that was not on the  
20 normal rotation panel for trustees in this district, but  
21 rather was a nationally-known bankruptcy attorney with more  
22 than 45 years of large Chapter 11 case experience. This  
23 Chapter 11 trustee performed valiantly, but was sued by  
24 entities in the Highland complex shortly after he was  
25 appointed, which this Court had to address. The Acis trustee

1 could not get Highland and its affiliates to agree to any  
2 actions taken in the case, and he finally obtained  
3 confirmation of a plan over Highland and its affiliates'  
4 objections in his fourth attempted plan, which confirmation  
5 then was promptly appealed by Highland and its affiliates.

6 Suffice it to say it was not easy to get such highly-  
7 qualified persons to serve as independent board members and  
8 CEO of this Debtor. They were stepping into a morass of  
9 problems. Naturally, they were worried about getting sued, no  
10 matter how defensible their efforts might be, given the  
11 litigation culture that enveloped Highland historically. It  
12 seemed as though everything always ended in litigation at  
13 Highland.

14 The Court heard credible testimony that none of them would  
15 have taken on the role of Independent Director without a good  
16 D&O insurance policy protecting them, without indemnification  
17 from Strand, guaranteed by the Debtor; without exculpation for  
18 mere negligence claims; and without a gatekeeper provision,  
19 such that the Independent Directors could not be sued without  
20 the bankruptcy court, as a gatekeeper, giving a potential  
21 plaintiff permission to sue.

22 With regard to the gatekeeper provision, this was  
23 precisely analogous to what bankruptcy trustees have pursuant  
24 to the so-called "Barton Doctrine," which was first  
25 articulated in an old U.S. Supreme Court case.

1       The Bankruptcy Court approved all of these protections in  
2 a January 9, 2020 order. No one appealed that order. And Mr.  
3 Dondero signed the settlement agreement that was approved by  
4 that order.

5       An interesting fact about the D&O policy came out in  
6 credible testimony at the confirmation hearing. Mr. Dubel and  
7 an insurance broker from Aon, named Marc Tauber, both credibly  
8 testified that the gatekeeper provision was needed because of  
9 the so-called, and I quote, "Dondero Exclusion" in the  
10 insurance marketplace.

11       Specifically, the D&O insurers in the marketplace did not  
12 want to cover litigation claims that might be brought against  
13 the Independent Directors by Mr. Dondero because the  
14 marketplace of D&O insurers are aware of Mr. Dondero's  
15 litigiousness. The insurers would not have issued a D&O  
16 policy to the Independent Directors without either the  
17 gatekeeping provision or a "Dondero Exclusion" being in the  
18 policy.

19       Thus, the gatekeeper provision was part of the January 9,  
20 2020 settlement. There was a sound business justification for  
21 it. It was reasonable and necessary. It was consistent with  
22 the Barton Doctrine in an extremely analogous situation --  
23 i.e., the independent board members were analogous to a three-  
24 headed trustee in this case, if you will. Mr. Dondero signed  
25 off on it. And, again, no one ever appealed the order

1 approving it.

2 The Court finds that, like the Creditors' Committee, the  
3 independent board members here have been resilient and  
4 unwavering in their efforts to get the enormous problems in  
5 this case solved. They seem to have at all times negotiated  
6 hard and with good faith. As noted previously, they changed  
7 the entire trajectory of this case.

8 Still another reason why this was not your garden-variety  
9 case was the mediation effort. In summer of 2020, roughly  
10 nine months into the Chapter 11 case, this Court ordered  
11 mediation among the Debtor, Acis, UBS, the Redeemer Committee,  
12 and Mr. Dondero. The Court selected co-mediators, since this  
13 seemed like such a Herculean task, especially during COVID-19,  
14 where people could not all be in the same room. Those co-  
15 mediators were Retired Bankruptcy Judge Allan Gropper from the  
16 Southern District of New York, who had a distinguished career  
17 presiding over complex Chapter 11 cases, and Ms. Sylvia Mayer,  
18 who likewise has had a distinguished career, first as a  
19 partner in a preeminent law firm working on complex Chapter 11  
20 cases, and subsequently as a mediator and arbitrator in  
21 Houston, Texas.

22 As noted earlier, the Acis claim was settled during the  
23 mediation, which seemed nothing short of a miracle to this  
24 Court, and the UBS claim was settled many months later, and  
25 this Court believes the groundwork for that ultimate



1 settlement was laid, or at least helped, through the  
2 mediation. And as earlier noted, other enormous claims have  
3 been settled during this case, including that of the Redeemer  
4 Committee, who, again, had asserted approximately or close to  
5 a \$200 million claim; HarbourVest, who asserted a \$300 million  
6 claim; and Patrick Daugherty, who asserted close to a \$40  
7 million claim.

8 This Court cannot stress strongly enough that the  
9 resolution of these enormous claims and the acceptance of all  
10 of these creditors of the Plan that is now before the Court  
11 seems nothing short of a miracle. It was more than a year in  
12 the making.

13 Finally, a word about the current remaining Objectors to  
14 the Plan before the Court. Once again, the Court will use the  
15 phrase "not garden-variety." Originally, there were over one  
16 dozen objections filed to this Plan. The Debtor has made  
17 various amendments or modifications to the Plan to address  
18 some of these objections. The Court finds that none of these  
19 modifications require further solicitation, pursuant to  
20 Sections 1125, 1126, 1127 of the Code, or Bankruptcy Rule  
21 3019, because, among other things, they do not materially  
22 adversely change the treatment of the claims of any creditor  
23 or interest holder who has not accepted in writing the  
24 modifications.

25 Among other things, there were changes to the projections

1 that the Debtor filed shortly before the confirmation hearing  
2 that, among other things, show the estimated distribution to  
3 creditors and compare plan treatment to a likely disbursement  
4 in a Chapter 7.

5 These do not constitute a materially adverse change to the  
6 treatment of any creditors or interest holders. They merely  
7 update likely distributions based on claims that have now been  
8 settled, and they've otherwise incorporated more recent  
9 financial data. This happens often before confirmation  
10 hearings. The Court finds that it did not mislead or  
11 prejudice any creditors or interest holders, and certainly  
12 there was no need to resolicit the Plan.

13 The only Objectors to the Plan left at this time were Mr.  
14 Dondero and entities that the Court finds are controlled by  
15 him. The standing of these entities to object to the Plan  
16 exists, but the remoteness of their economic interest is  
17 noteworthy, and the Court questions the good faith of the  
18 Objectors. In fact, the Court has good reason to believe that  
19 these parties are not objecting to protect economic interests  
20 they have in the Debtor, but to be disruptors.

21 Mr. Dondero wants his company back. This is  
22 understandable. But it's not a good faith basis to lob  
23 objections to the Plan. The Court has slowed down  
24 confirmation multiple times on the current Plan and urged the  
25 parties to talk to Mr. Dondero. The parties represent that

1 they have, and the Court believes that they have.

2 Now, to be specific about the remoteness of the objectors'  
3 interests, the Court will address them each separately.  
4 First, Mr. Dondero has a pending objection. Mr. Dondero's  
5 only economic interest with regard to the Debtor at this point  
6 is an unliquidated indemnification claim. And based on  
7 everything this Court has heard, his indemnification claim  
8 will be highly questionable at this juncture.

9 Second, a joint objection has been filed by the Dugaboy  
10 Trust and the Get Good Trust. As for the Dugaboy Trust, it  
11 was created to manage the assets of Mr. Dondero and his  
12 family, and it owns a 0.1866 percent limited partnership  
13 interest in the Debtor. The Court is not clear what economic  
14 interest the Get Good Trust has, but it likewise seems to be  
15 related to Mr. Dondero, and it has been represented to the  
16 Court numerous times that the trustee is Mr. Dondero's college  
17 roommate.

18 Another group of Objectors that has joined together in one  
19 objection is what the Court will refer to as the Highland and  
20 NexPoint Advisors and Funds. The Court understands they  
21 assert disputed administrative expense claims against the  
22 estate. While the evidence presented was that they have  
23 independent board members that run these companies, the Court  
24 was not convinced of their independence from Mr. Dondero.  
25 None of the so-called independent board members of these

1 entities have ever testified before the Court. Moreover, they  
2 have all been engaged with the Highland complex for many  
3 years.

4 The witness who testified on these Objectors' behalves at  
5 confirmation, Mr. Jason Post, their chief compliance officer,  
6 resigned from Highland after more than twelve years in October  
7 2020, at the same time that Mr. Dondero resigned or was  
8 terminated by Highland. And a prior witness recently for  
9 these entities whose testimony was made part of the record at  
10 the confirmation hearing essentially testified that Mr.  
11 Dondero controlled these entities.

12 Finally, various NexBank entities objected to the Plan.  
13 The Court does not believe they have liquidated claims. Mr.  
14 Dondero appears to be in control of these entities as well.

15 To be clear, the Court has allowed all of these objectors  
16 to fully present arguments and evidence in opposition to  
17 confirmation, even though their economic interests in the  
18 Debtor appear to be extremely remote and the Court questions  
19 their good faith. Specifically on that latter point, the  
20 Court considers them all to be marching pursuant to the orders  
21 of Mr. Dondero.

22 In the recent past, Mr. Dondero has been subject to a TRO  
23 and preliminary injunction by the Bankruptcy Court for  
24 interfering with the current CEO's management of the Debtor in  
25 specific ways that were supported by evidence. Around the

1 time that this all came to light and the Court began setting  
2 hearings on the alleged interference, Mr. Dondero's company  
3 phone supplied to him by Highland, which he had been asked to  
4 turn in, mysteriously went missing. The Court merely mentions  
5 this in this context as one of many reasons that the Court has  
6 to question the good faith of Mr. Dondero and his affiliated  
7 objectors.

8 The only other pending objection besides these objections  
9 of the Dondero and Dondero-controlled entities is an objection  
10 of the United States Trustee pertaining to the release,  
11 exculpation, and injunction provisions in the Plan.

12 In juxtaposition to these pending objections, the Court  
13 notes that the Debtor has resolved earlier-filed objections to  
14 the Plan filed by the IRS, Patrick Daugherty, CLO Holdco,  
15 Ltd., numerous local taxing authorities, and certain current  
16 and former senior-level employees of the Debtor.

17 With that rather detailed factual background addressed,  
18 because certainly context matters here, the Court now  
19 addresses what it considers the only serious objections raised  
20 in connection with confirmation. Specifically, the Plan  
21 contain certain releases, exculpation, plan injunctions, and a  
22 gatekeeper provision which are obviously not fully consensual,  
23 since there are objections. Certainly, these provisions are  
24 mostly consensual when you consider that parties with hundreds  
25 of millions of dollars' worth of legitimate claims have not

1 objected to them.

2 First, a word about plan releases generally, since the  
3 Objectors at times seem to gloss over, in this Court's view,  
4 relevant distinctions, and seem to refer to the plan releases  
5 in this Plan and the exculpations and the plan injunctions all  
6 as impermissible third-party releases, when, in fact, they are  
7 not, *per se*.

8 It has, without a doubt, become quite commonplace in  
9 complex Chapter 11 bankruptcy cases to have three categories  
10 of releases in plans. These three types are as follows.

11 First, Debtor Releases. A debtor release involves a  
12 release by the debtor and its bankruptcy estate of claims  
13 against nondebtor third-parties. For example, a release may  
14 be granted in favor of creditors, directors, officers,  
15 employees, professionals who participated in the bankruptcy  
16 process. This is the least-controversial type of release  
17 because the debtor is extinguishing its own claims, which are  
18 property of the estate, that a debtor has authority to utilize  
19 or not, pursuant to Sections 541 and 363 of the Bankruptcy  
20 Code.

21 Authority for a debtor release pursuant to a plan arises  
22 out of Section 1123(b) (3) (A), which indicates that a plan may  
23 provide for "the settlement or adjustment of any claim or  
24 interest belonging to the debtor or to the estate."

25 In this context, it would appear that the only analysis

1 required is to determine whether the release or settlement of  
2 the claim is an exercise of reasonable business judgment on  
3 that part of the debtor, is it fair and equitable, is it in  
4 the best interest of the estate, given all the relevant facts  
5 and circumstances? Also relevant is whether there's  
6 consideration given of some sort by the releasees.

7 Now, the second type of very commonplace Chapter 11 plan  
8 release is an exculpation. Chapter 11 plans also very often  
9 have these exculpation provisions, and they're something much  
10 narrower in scope and time than a full-fledged release. An  
11 exculpation provision is more like a shield for a certain  
12 subset of key actors in the case for their acts during and in  
13 connection with the case, which acts may have been merely  
14 negligent.

15 Specifically, a plan may absolve certain actors -- usually  
16 estate fiduciaries -- such as an Official Unsecured Creditors'  
17 Committee and its members, Committee professionals, sometimes  
18 Debtor professionals, senior management, officers and  
19 directors of the Debtor, from any liability for postpetition  
20 negligent conduct -- i.e., conduct which occurred during the  
21 administration of the Chapter 11 case and in the negotiation,  
22 drafting, and implementation of a plan. An exculpation  
23 provision typically excludes gross negligence and willful  
24 misconduct. It is usually worded in a passive voice, so it  
25 may seem a little unclear as to whether it is actually a

1 release and by whom.

2 In any event, the rationale is that parties who actively  
3 participate in a court-approved process -- often, court-  
4 approved transactions by court order -- should receive  
5 protection for their work. Otherwise, who would want to work  
6 in such a messy, contentious situation, only to be sued for  
7 alleged negligence for less-than-perfect end results?

8 Chapter 11 end results are not always pretty. One could  
9 argue that these exculpation provisions, though, are much ado  
10 about nothing. Why? For one thing, again, the shield is only  
11 as to negligent conduct. There is no shield for other  
12 problematic conduct, such as gross negligence or willful  
13 misconduct.

14 Second, in many situations, any claims or causes of action  
15 that might arise will belong to the Debtor or its estate.  
16 Thus, they would already be released pursuant to a debtor  
17 release.

18 Additionally, there is case law stating that, where a  
19 claim is brought against an estate professional whose fees  
20 have already been approved in a final fee application, any  
21 claims are barred by *res judicata*. Thus, exculpated  
22 professionals would only have potential exposure for a very  
23 short window of time, until final fee applications.

24 Additionally, certain case law in Texas makes clear that  
25 an attorney generally does not owe any duties to persons other



1 than his own client.

2 All of this suggests that the shield of a typical  
3 exculpation provision may rarely become useful or needed.

4 Moving now to the third type of release, a true third-  
5 party release, Chapter 11 plans also sometimes contain third-  
6 party releases. A true third-party release involves the  
7 release of claims held by nondebtor third parties against  
8 other nondebtor third parties, and there is often no  
9 limitation on the scope and time of the claims released.

10 This is the most heavily scrutinized of the three types of  
11 plan releases. Much of the case authority focuses on whether  
12 a third-party release is consensual or not in analyzing their  
13 propriety and/or enforceability.

14 In Highland, there are no third-party releases. Rather,  
15 there are debtor releases and exculpations. There also happen  
16 to be plan injunctions and gatekeeper provisions that have  
17 been challenged. The Objectors argue that these provisions  
18 violate the Fifth Circuit's opinion in *Pacific Lumber* or are  
19 otherwise beyond the jurisdiction or authority of the  
20 bankruptcy court. These arguments are now addressed.

21 First, the debtor release is found at Article IX.D of the  
22 Plan. The language, in pertinent part, reads as follows. "On  
23 and after the effective date, each Released Party is deemed to  
24 be hereby conclusively, absolutely, unconditionally,  
25 irrevocably, and forever released and discharged by the Debtor

1 and the Estate, in each case on behalf of themselves and their  
2 respective successors, assigns, and representatives, including  
3 but not limited to the Claimant Trust and the Litigation Sub-  
4 Trust, from any and all causes of action, including any  
5 derivative claims, asserted on behalf of the Debtor, whether  
6 known or unknown, foreseen or unforeseen, matured or  
7 unmatured, existing or hereafter arising, in law, equity,  
8 contract, tort, or otherwise, that the Debtor or the Estate  
9 would have been legally entitled to assert in their own right,  
10 whether individually or collectively, or on behalf of the  
11 holder of any claim against, or interest in, a debtor or other  
12 person."

13       There are certain exceptions discussed, and then Released  
14 Parties are defined at Definition 113 of the Plan collectively  
15 as: the Independent Directors; Strand, solely from the date  
16 of the appointment of the Independent Directors through the  
17 effective date; the CEO/CRO; the Committee, the members of the  
18 Committee, in their official capacities; the professionals  
19 retained by the Debtor and the Committee in the Chapter 11  
20 case; and the employees. This is a defined term in the Plan  
21 Supplement and does not include certain employees.

22       To be clear, these are not third-party releases such as  
23 addressed in the *Pacific Lumber* case. These are the Debtor's  
24 and/or the bankruptcy estate's causes of action that are  
25 proposed to be released. Releases by a debtor are

1 discretionary and can be provided by a debtor to persons who  
2 have provided consideration to the debtor and the estate.  
3 Section 1123(b) (3) (A) of the Bankruptcy Code permits this.

4 The evidence here supported the notion that these releases  
5 are a *quid pro quo* for the Released Parties' significant  
6 contributions to a highly complex and contentious  
7 restructuring. The Debtor is releasing its own claims. Some  
8 of the Released Parties would have indemnification rights  
9 against the Debtor. And the Debtor's CEO, James Seery,  
10 credibly testified that he does not believe any claims exist  
11 as to the Released Parties. The Court approves the Debtor  
12 releases and overrules the objections to them.

13 Next, the exculpations appear at Article IX.C of the Plan  
14 and provide as follows: Subject in all respects to Article  
15 XII.D of the Plan, to the maximum extent permitted by  
16 applicable law, no Exculpated Party will have or incur, and  
17 each Exculpated Party is hereby exculpated from, any claim,  
18 obligation, suit, judgment, damage, demand, debt, right, cause  
19 of action, remedy, loss, and liability for conduct occurring  
20 on or after the petition date in connection with or arising  
21 out of the filing and administration of the Chapter 11 case,  
22 the negotiation and pursuit of a disclosure statement, the  
23 Plan, or the solicitation of votes for or confirmation of the  
24 Plan, the funding or consummation of the Plan, or any related  
25 agreements, instruments, et cetera, et cetera, whether or not

1 such Plan distributions occur following the effective date,  
2 the implementation of the Plan, and any negotiation,  
3 transactions, and documentation in connection with the  
4 foregoing clauses, provided, however, the foregoing will not  
5 apply to any acts or omissions of any Exculpated Party arising  
6 out of or related to acts or omissions that constitute bad  
7 faith, fraud, gross negligence, criminal misconduct, or  
8 willful misconduct; or Strand or any employee other than with  
9 respect to actions taken by such entities from the date of  
10 appointment of the Independent Directors through the effective  
11 date.

12 Exculpated Parties are later defined at Section -- or,  
13 earlier defined at Section 62 of the Plan, Definition No. 62  
14 of the Plan, as later limited by the Debtor, as announced in  
15 the confirmation hearing. And so these are the Exculpated  
16 Parties: the Debtor and its successors and assigns; the  
17 employees, certain employees, as defined; Strand; the  
18 Independent Directors; the Committee, the members of the  
19 Committee, in their official capacities; the professionals  
20 retained by the Debtor and the Committee in the Chapter 11  
21 case; the CEO and CRO; and the related persons as to each of  
22 these parties listed in Part (iv) through (viii) above;  
23 provided, for the avoidance of doubt, and it goes on to say  
24 Dondero, Mark Okada, and various others aren't Exculpated  
25 Parties.

1 Now, as earlier mentioned, the Objectors argue that  
2 *Pacific Lumber*, 584 F.3d 229, a Fifth Circuit case from 2009,  
3 categorically rejects the permissibility of nonconsensual  
4 exculpations as well as third-party releases in a Chapter 11  
5 plan. So the Court is going to take a deep dive into that  
6 assertion.

7 In *Pacific Lumber*, the Fifth Circuit reviewed on appeal  
8 numerous challenges to a confirmed plan of affiliated debtors  
9 known as Palco and Scopac and four subsidiaries. The debtor  
10 Palco owned and operated the sawmill, a power plant, and even  
11 a town called Scotia, California. The debtor Scopac owned  
12 timberlands. A creditor, a secured creditor called Marathon  
13 had a claim against Palco's assets. Marathon estimated  
14 Palco's assets were worth \$110 million. Its claim was \$160  
15 million. Meanwhile, other parties had large secured claims  
16 against the other debtor, Scopac.

17 The plan that the bankruptcy court confirmed, which was on  
18 appeal to the Fifth Circuit, was filed by both the secured  
19 creditor Marathon and a joint plan proponent called MRC. MRC  
20 was a competitor of the debtor Palco. The Marathon/MRC plan  
21 proposed to dissolve all the debtors, cancel intercompany  
22 debts, and create two new entities, Townco and Newco. Almost  
23 all of the debtor Palco's assets, including the town of  
24 Scotia, California, would be transferred to Townco. The  
25 timberlands and other assets, including the sawmill, would be

1 placed in Newco.

2 Marathon and MRC proposed to contribute \$580 million to  
3 Newco to pay claims against Scopac. And Marathon would  
4 convert its secured claim against Palco's assets into equity,  
5 giving it full ownership of Townco, a 15 percent stake in  
6 Newco, and a new note for the sawmill's working capital. MRC  
7 would own the other 80 percent of Newco and would manage and  
8 run the company.

9 An indenture trustee for the secured indebtedness against  
10 Scopac -- which, by the way, had also been a plan proponent of  
11 a competing plan -- appealed the confirmation order, raising  
12 eight distinct issues on appeal. One of the eight issues  
13 pertained to what the Fifth Circuit referred to as a  
14 "nondebtor exculpation and release clause." This issue is  
15 discussed on the last two pages of a very lengthy opinion.

16 While the complained-of provision is not quoted verbatim  
17 in the *Pacific Lumber* opinion, it appears to have been a  
18 typical exculpation clause. Not a third-party release; a  
19 typical exculpation clause. The Fifth Circuit stated, "The  
20 plan releases MRC, Marathon, Newco, Townco, and the Unsecured  
21 Creditors' Committee, and their personnel, from liability,  
22 other than for willful and gross negligence related to  
23 proposing, implementing, and administering the plan" at Page  
24 251.

25 The Fifth Circuit held that "the nondebtor releases must

1 be struck except with respect to the Creditors' Committee and  
2 its members."

3 Footnote 26 of the opinion also states that the appellants  
4 had "not briefed why Newco and Townco or their officers and  
5 directors should not be released," and so "we do not analyze  
6 their position." Rather, the Fifth Circuit merely analyzed  
7 why the exculpation provision was not permissible as to the  
8 two plan proponents, MRC and Marathon.

9 Thus, the Court views *Pacific Lumber* as being a holding  
10 that squarely addressed the propriety of two plan proponents,  
11 a secured lender and a third-party competitor purchaser of the  
12 Debtors, obtaining nonconsensual exculpation in the plan.  
13 However, its reasoning certainly cannot be ignored, strongly  
14 suggesting it would not be inclined to approve an exculpation  
15 for any party other than a Creditors' Committee or its  
16 members.

17 As far as the Fifth Circuit's reasoning, it relied on  
18 Bankruptcy Code Section 524(e) for striking down the  
19 exculpations, stating, "The law states, however, that  
20 discharge of a debt of the debtor does not affect the  
21 liability of any other entity on such debt." Page 251. The  
22 opinion suggests that MRC and Marathon may have tried to argue  
23 that 524(e) did not apply to their exculpations because MRC  
24 and Marathon were not liable as co-obligors in any way on any  
25 of the debtor's debt.

1       The Fifth Circuit seemed dismissive of this argument,  
2       stating as follows, "MRC/Marathon insist the release clause is  
3       part of their bargain because, without the clause, neither  
4       company would have been willing to provide the plan's  
5       financing. Nothing in the records suggests that MRC/Marathon,  
6       the Committee, or the Debtor's officers and directors were co-  
7       liable for the Debtor's prepetition debts. Instead, the  
8       bargain the proponents claim to have purchased is exculpation  
9       from any negligence that occurred during the course of the  
10       case. Any costs the released parties might incur defending  
11       against suits alleging such negligence are unlikely to swamp  
12       either of these parties or the consummated reorganization. We  
13       see little equitable about protecting the released nondebtors  
14       from negligence suits arising out of the reorganization."

15       The Court goes on to note that, in a variety of cases,  
16       that releases have been approved, but these cases "seem  
17       broadly to foreclose nonconsensual nondebtor releases and  
18       permanent injunctions."

19       The Court then adds at Footnote 27 that the Fifth Circuit  
20       in the past did not set aside challenged plan releases that  
21       were in final nonappealable orders and were the subject of  
22       collateral attack much later, citing its famous *Republic*  
23       *Supply v. Shoaf* case, where the Fifth Circuit ruled that *res*  
24       *judicata* barred a debtor from bringing a claim that was  
25       specifically and expressly released by a confirmed



1 reorganization plan because the debtor -- the objector failed  
2 to object to the release at confirmation.

3 The Fifth Circuit in *Pacific Lumber* also noted that the  
4 Bankruptcy Code permits bankruptcy courts to enjoin third-  
5 party asbestos claims under certain circumstances, 524(g),  
6 which the Court said suggests nondebtor releases are most  
7 appropriate as a method to channel mass tort claims towards a  
8 specific pool of assets, citing numerous cases, including  
9 *Johns-Manville*.

10 In reach its holding, the Fifth Circuit saw no reason to  
11 uphold exculpation to the plan proponents MRC and Marathon,  
12 seeming to find it inconsistent with 524(e) under the facts at  
13 bar, but the Court did uphold exculpation for the Creditors'  
14 Committee and its members, stating, "We agree, however, with  
15 courts that have held that 1103(c) under the Code, which lists  
16 the Creditors' Committee's powers, implies Committee members  
17 have qualified immunity for actions within the scope of their  
18 duties." Numerous cites. "The Creditors' Committee and its  
19 members are the only disinterested volunteers among the  
20 parties sought to be released here. The scope of protection,  
21 which does not insulate them from willful and gross  
22 negligence, is adequate."

23 Thus, the Court held that the exculpation provisions in  
24 *Pacific Lumber* must be struck except with regard to the  
25 Creditors' Committee and its members.

1        Now, after all of that, this Court believes the following  
2        can be gleaned from *Pacific Lumber*. First, the Fifth Circuit  
3        hinted that consensual exculpations and/or consensual  
4        nondebtor third-party releases are permissible. The Court  
5        was, of course, dealing with nonconsensual exculpations in  
6        *Pacific Lumber*. In this regard, I note Page 252, where the  
7        Court cited various prior Fifth Circuit authority and then  
8        stated, "These cases seem broadly to foreclose nonconsensual  
9        nondebtor releases and permanent injunctions."

10       The second thing that can be gleaned from *Pacific Lumber*:  
11       The Fifth Circuit hinted that nondebtor releases may be  
12       permissible in cases involving global settlements of mass  
13       claims against the debtors and co-liable parties. The Court,  
14       of course, referred to 524(g), but various other cases which  
15       approved nondebtor releases where mass claims were channeled  
16       to a specific pool of assets.

17       Third, the Fifth Circuit outright held that exculpations  
18       from negligence for a Creditors' Committee and its members are  
19       permissible because the concept is both consistent with  
20       1103(c), "which implies Committee members have qualified  
21       immunity for actions within the scope of their duties," and a  
22       good policy result, since "if members of the Committee can be  
23       sued by persons unhappy with the outcome of the case, it will  
24       be extremely difficult to find members to serve on an official  
25       committee."

Fourth, the Fifth Circuit recognized in *Pacific Lumber* that *res judicata* may bar complaints regarding an impermissible plan release, citing to its earlier *Republic Supply v. Shoaf* opinion.

Now, being ever-mindful of the Fifth Circuit's words in *Pacific Lumber*, this Court cannot help but wonder about at least three things.

First, did the Fifth Circuit leave open the door that facts/equities might sometimes justify approval of an exculpation for a person other than a Creditors' Committee and its members? For example, the Fifth Circuit stated, in referring to the plan proponents Marathon and MRC, that "Any costs the released parties might incur defending against suits alleging such negligence are unlikely to swamp either of these parties or the consummated reorganization." Here, this Court can easily expect the proposed exculpated parties to incur costs that could swamp them and the reorganization based on the past litigious conduct of Mr. Dondero and his controlled entities. Do these words of the Fifth Circuit hint that equities/economics might sometimes justify an exculpation?

Second, did the Fifth Circuit's rationale for permitted exculpations to Creditors' Committee and their members, which was clearly policy-based, based on their implied qualified immunity flowing from their duties in Section 1103 and their disinterestedness, and the importance of their role in a

1 Chapter 11 case, did this rationale leave open the door to  
2 sometimes permitting exculpations to other parties in a  
3 particular Chapter 11 case besides Creditors' Committees and  
4 their members? For example, in a situation such as the  
5 Highland case, in which Independent Directors, brought in to  
6 avoid a trustee, are more like a Creditors' Committee than an  
7 incumbent board of directors.

8 Third, the Fifth Circuit's sole statutory basis was  
9 Section 524(e). This Court would humbly submit that this is a  
10 statute dealing with prepetition liability in which some  
11 nondebtor is liable with the Debtor. Exculpation is a concept  
12 dealing with postpetition liability.

13 The Ninth Circuit recently, in a case called *Blixseth v.*  
14 *Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020), approved the  
15 validity of an exculpation clause incorporated into a  
16 confirmed Chapter 11 plan that purported to absolve certain  
17 nondebtor parties that were "closely involved" in drafting the  
18 plan. They were the largest secured creditor, a purchaser,  
19 and an individual who was an indirect owner of certain of the  
20 debtor companies. The exculpation was from any negligence,  
21 liability, for "any act or omission in connection with,  
22 related to, or arising out of the Chapter 11 cases."

23 By the time the appeal was before the Ninth Circuit, the  
24 only issue was the propriety of the exculpation clause as to  
25 the large secured creditor, which was also a plan proponent,

1 since all the other exculpated parties had settled with the  
2 appellant.

3 The Court, in determining that the exculpation clause was  
4 permissible as to the secured lender, concluded that Section  
5 524(e) "does not bar a narrow exculpation clause of the kind  
6 here at issue -- that is, one focused on actions of various  
7 participants in the plan approval process and relating only to  
8 that process," Page 1082. Why? Because "Section 524(e)  
9 establishes that discharge of a debt of the debtor does not  
10 affect the liability of any other entity on such debt." In  
11 other words, the discharge in no way affects the liability of  
12 any other entity for the discharged debt. By its terms,  
13 524(e) prevents a bankruptcy court from extinguishing claims  
14 of creditors against nondebtors over the very discharged debt  
15 through the bankruptcy proceedings.

16 The Court went on to explicitly disagree with *Pacific*  
17 *Lumber* in its analysis of 524(e), reiterating that an  
18 exculpation clause covers only liabilities arising from the  
19 bankruptcy proceedings and not of any of the debtor's  
20 discharged debt. Footnote 7, Page 1085.

21 Ultimately, the Court held that under Section 105(a),  
22 which empowers a bankruptcy court to issue any order, process,  
23 or judgment that is necessary or appropriate to carry out the  
24 provisions of Chapter 11 and Section 1123, which establishes  
25 the appropriate content of the bankruptcy plan, under these

1 sections, the bankruptcy court had authority to approve an  
2 exculpation clause intended to trim subsequent litigation over  
3 acts taken during the bankruptcy proceedings and so render the  
4 plan viable.

5 This Court concludes that, just as the Fifth Circuit left  
6 open the door for consensual exculpations and releases in  
7 *Pacific Lumber*, just as it left open the door for consensual  
8 exculpations and releases in *Pacific Lumber*, its dicta  
9 suggests that an exculpation might be permissible if there is  
10 a showing that "costs that the released parties might incur  
11 defending against suits alleging such negligence are likely to  
12 swamp either the Exculpated Parties or the reorganization."  
13 Again, that was a quote from the Fifth Circuit.

14 If ever there were a risk of that happening in a Chapter  
15 11 reorganization, it is this one. The Debtor's current CEO  
16 credibly testified that Mr. Dondero has said outside the  
17 courtroom that if Mr. Dondero's own pot plan does not get  
18 approved, that he will "burn the place down." Here, this  
19 Court can easily expect the proposed exculpated parties might  
20 expect to incur costs that could swamp them and the  
21 reorganization process based on the past litigious conduct of  
22 Mr. Dondero and his controlled entities.

23 Additionally, this Court concludes that the Fifth  
24 Circuit's rationale in *Pacific Lumber* for permitted  
25 exculpations to Creditors' Committees and their members, which

1 was clearly policy-based based on their implied qualified  
2 immunity flowing from Section 1103 and their importance in a  
3 Chapter 11 case, leaves the door open to sometimes permitting  
4 exculpations to other parties in a particular Chapter 11 case  
5 besides a UCC and its members.

6 Again, if there was ever such a case, the Court believes  
7 it is this one, in which Independent Directors were brought in  
8 to avoid a trustee and are much more like a Creditors'  
9 Committee than an incumbent board of directors. While,  
10 admittedly, there are a few exculpated parties here proposed  
11 beyond the independent board, such as certain employees, it  
12 would appear that no one is invulnerable to a lawsuit here if  
13 past is prologue in this Highland saga.

14 The Creditors' Committee was initially not keen on  
15 exculpations for certain employees. However, Mr. Seery  
16 credibly testified that there was a contentious arm's-length  
17 negotiation over this and that he needs these employees to  
18 preserve value implementing the Plan. Mr. Dondero has shown  
19 no hesitancy to litigate with former employees in the past, to  
20 the *nth* degree, and there is every reason to believe he would  
21 again in the future, if able.

22 Finally, in this situation, in the case at bar, we would  
23 appear to have a *Shoaf* reason to approve the exculpations.  
24 The January 9, 2020 order of this Court, Docket Entry 339,  
25 which approved the independent board and an ongoing corporate

1 governance structure for this case, and which is incorporated  
2 into the Plan at Article IX.H, provided as follows: "No  
3 entity may commence or pursue a claim or cause of action of  
4 any kind against any Independent Director, any Independent  
5 Director's agents, or any Independent Director's advisors  
6 relating in any way to the Independent Director's role as an  
7 Independent Director of Strand without the Court (1) first  
8 determining, after notice, that such claim or cause of action  
9 represents a colorable claim of willful misconduct or gross  
10 negligence against Independent Director, any Independent  
11 Director's agents, or any Independent Director's advisors; and  
12 (2) specifically authorizing such entity to bring such a  
13 claim. The Court will have sole jurisdiction to adjudicate  
14 any claim for which approval of the Court to commence or  
15 pursue has been granted."

16 This was both an exculpation from negligence as to the  
17 Independent Directors and their agents and advisors, as well  
18 as a gatekeeping provision. This Court believes that this  
19 provision basically approved an exculpation for the  
20 Independent Directors way back on January 9, 2020 for their  
21 postpetition conduct that might be negligent. And this is the  
22 law of the case and has *res judicata* preclusive effect now.

23 Thus, as to the three Independent Directors, as well as  
24 the other named parties in the January 9, 2020 order, their  
25 agents, their advisors, we have a situation that fits within



1 *Republic Supply v. Shoaf*, and we fit within the exception  
2 articulated in *Pacific Lumber*.

3 The Court reserves the right to supplement these findings  
4 and conclusions as to the exculpations, but based on the  
5 foregoing, they are approved and the objections are overruled.

6 Now, turning to the Plan objection, it appears at Article  
7 IX.F of the Plan and provides, in pertinent part, as follows:  
8 Upon entry of the confirmation order, all enjoined parties are  
9 and shall be permanently enjoined on and after the effective  
10 date from taking any action to interfere with the  
11 implementation or consummation of the Plan. Except as  
12 expressly provided in the Plan, the confirmation order, or a  
13 separate order of the Bankruptcy Court, all Enjoined Parties  
14 are and shall be permanently enjoined on and after the  
15 effective date, with respect to any claims and interests, from  
16 directly or indirectly -- and then commencing, conducting,  
17 continuing any suit, action, proceeding of any kind, and  
18 numerous other acts of that vein.

19 The injunction set forth herein shall extend to and apply  
20 to any act of the type set forth in any of the causes above  
21 against any successors to the Debtor, including but not  
22 limited to the Reorganized Debtor, the Litigation Sub-Trust,  
23 and the Claimant Trust, and their respective property and  
24 interests in property.

25 Plan injunctions like this are commonplace and

1 appropriate. They are entirely consistent with and  
2 permissible under Bankruptcy Code Sections 1123(a)(5),  
3 1123(a)(6), 1141(a) and (c), and 1142, as well as Bankruptcy  
4 Rule 3016(c), which articulates the form that a plan  
5 injunction must be set forth in a plan.

6 The Court finds the objections to the Plan Injunctions to  
7 be unfounded, and they are thus overruled without much  
8 discussion here.

9 Now, lastly, the Gatekeeper Provision. It appears at  
10 Paragraph 4 of Article IX.F of the Plan and provides, in  
11 pertinent part, "Subject in all respects to Article XII.D, no  
12 Enjoined Party may commence or pursue a claim or cause of  
13 action of any kind against any Protected Party that arose or  
14 arises from or is related to the Chapter 11 case, the  
15 negotiation of the Plan, the administration of the Plan, or  
16 property to be distributed under the Plan, the wind-down of  
17 the business of the Debtor or Reorganized Debtor, the  
18 administration of the Claimant Trust or the Litigation Sub-  
19 Trust, or the transactions in furtherance of the foregoing,  
20 without the Bankruptcy Court (1) first determining, after  
21 notice and a hearing, that such claim or cause of action  
22 represents a colorable claim of any kind, including but not  
23 limited to negligence, bad faith, criminal misconduct and  
24 willful misconduct, fraud, or gross negligence against a  
25 Protected Party; and (2) specifically authorizing such

1 Enjoined Party to bring such claim or cause of action against  
2 such Protected Party, provided, however, that the foregoing  
3 will not apply to a claim or cause of action against Strand or  
4 against any employee other than with respect to actions taken,  
5 respectively, by Strand or any such employee from the date of  
6 appointment of the Independent Directors through the effective  
7 date. The Bankruptcy Court will have sole and exclusive  
8 jurisdiction to determine whether a claim or cause of action  
9 is colorable and, only to the extent legally permissible and  
10 as provided for in Article XI, shall have jurisdiction to  
11 adjudicate the underlying colorable claim or cause of action."

12 This gatekeeper provision appears necessary and reasonable  
13 in light of the litigiousness of Mr. Dondero and his  
14 controlled entities that has been described at length herein.  
15 Provisions similar to this have been approved in this district  
16 in the *Pilgrim's Pride* case and the *CHC Helicopter* case. The  
17 provision is within the spirit of the Supreme Court's Barton  
18 Doctrine. And it appears consistent with the notion of a pre-  
19 filing injunction to deter vexatious litigants that has been  
20 approved by the Fifth Circuit in such cases as *Baum v. Blue*  
21 *Moon Ventures*, 513 F.3d 181, and in the *In re Carroll* case,  
22 850 F.3d 811, which arose out of a bankruptcy pre-filing  
23 injunction.

24 The Fifth Circuit, in fact, noted in the *Carroll* case that  
25 federal courts have authority to enjoin vexatious litigants

1 under the All Writs Act, 28 U.S.C. § 1651. And additionally,  
2 under the Bankruptcy Code, a bankruptcy court can issue any  
3 order, including a civil contempt order, necessary or  
4 appropriate to carry out the provisions of the Code, citing,  
5 of course, 105 of the Bankruptcy Code.

6 The Fifth Circuit stated that, when considering whether to  
7 enjoin future filings against a vexatious litigant, a  
8 bankruptcy court must consider the circumstances of the case,  
9 including four factors: (1) the party's history of  
10 litigation; in particular, whether he has filed vexatious,  
11 harassing, or duplicative lawsuits; (2) whether the party had  
12 a good faith basis for pursuing the litigation, or perhaps  
13 intended to harass; (3) the extent of the burden on the courts  
14 and other parties resulting from the party's filings; and (4)  
15 the adequacy of alternatives.

16 In the *Baum* case, the Fifth Circuit stated that the  
17 traditional standards for injunctive relief -- *i.e.*,  
18 irreparable harm and inadequate remedy at law -- do not apply  
19 to the issuance of an injunction against a vexatious litigant.

20 Here, although I have not been asked to declare Mr.  
21 Dondero and his affiliated entities as vexatious litigants *per*  
22 *se*, it is certainly not beyond the pale to find that his long  
23 history with regard to the major creditors in this case has  
24 strayed into that possible realm, and thus this Court is  
25 justified in approving this provision.

1       One of the Objectors' lawyers stated very eloquently in  
2 closing argument, in opposing the plan injunction and  
3 gatekeeping provisions, that "Even a serial killer has  
4 constitutional rights," suggesting that these provisions would  
5 deprive Mr. Dondero and his controlled entities of fundamental  
6 rights or due process somehow. But to paraphrase the district  
7 court in the *Carroll* case, no one, rich or poor, is entitled  
8 to abuse the judicial process. There exists no constitutional  
9 right of access to the courts to prosecute actions that are  
10 frivolous or malicious. The Plan injunction and gatekeeper  
11 provisions in Highland's plan simply set forth a way for this  
12 Court to use its tools, its inherent powers, to avoid abuse of  
13 the court system, protect the implementation of the Plan, and  
14 preempt the use of judicial time that properly could be used  
15 to consider the meritorious claims of other litigants.

16       Accordingly, the Objectors' objections to this provision  
17 are overruled.

18       As earlier stated, this Court reserves the right to alter  
19 or supplement this ruling in a written order. In this regard,  
20 the Court directs Debtor's counsel -- I hope you are still  
21 awake; it's been a long time -- the Court directs Debtor's  
22 counsel to submit a form of order. And specifically, I assume  
23 that you've already prepared or have been in the process of  
24 preparing a set of findings of fact, conclusions of law, and  
25 confirmation order that tracks the confirmation evidence and

1 recites conclusions of law that the Plan complies with all the  
2 various provisions of Section 1123, 1129, and other applicable  
3 Code provisions.

4 What I want you to do is take this bench ruling and add it  
5 to what you've prepared. And what I mean is, as you can tell,  
6 I've been reading: I will have my courtroom deputy email to  
7 you all a copy of what I just read. I'll have her obviously  
8 copy the Debtor's counsel, Creditors' Committee, Dondero and  
9 the other Objectors, copy them on this written document she's  
10 going to send out. And, again, I want you to kind of meld it  
11 into what you've already been preparing.

12 Obviously, I did not address in this oral ruling every  
13 provision of 1129(a) and (b). I did not address every 1123  
14 objection. I did not even address every single objection of  
15 the Objectors. But, again, any objection I've not  
16 specifically addressed today is overruled.

17 The briefing, I should say, that the Debtor submitted,  
18 there was a Memorandum of Law in Support of Confirmation filed  
19 on January 22nd. There was also a reply brief, a hundred  
20 pages or so, separately filed, replying to all the objections.  
21 I don't disagree with anything that was in that. So, again,  
22 to the extent you want to send me conclusions of law that are  
23 along the lines of that briefing, I would consider that.

24 And so what I thought is you'll send me the melded  
25 document and I will edit it if I see fit. I recognize this

1 may take a few days, so I don't give you a strict timetable,  
2 just hopefully it won't take too many days.

3 All right. Is there anyone out there -- Mr. Pomerantz,  
4 you had to go to jury duty, except I can't believe --

5 MR. POMERANTZ: No, I --

6 THE COURT: I can't believe you were called, but are  
7 you there?

8 MR. POMERANTZ: Your Honor, I am here. I was luckily  
9 excused, because I probably wouldn't have made it.

10 Your Honor, one just comment I'd make. You referred to  
11 the January 9th order. You didn't refer to the CEO order,  
12 which is your order July 16th, which had the same gatekeeper  
13 provision. I assume that was the same analysis?

14 THE COURT: That was an oversight. Same analysis.  
15 And that's exactly why I said I reserve the right to  
16 supplement or amend, because I know there had to be places  
17 like that where I omitted to mention something important.

18 MR. POMERANTZ: But thank you, Your Honor, for your  
19 thoughtful ruling, and we will certainly incorporate your  
20 materials into the order that we're working on and get it to  
21 you when we can. But we appreciate it on behalf of the  
22 Debtor. We know this took a lot of time and a lot of effort.  
23 Hopefully, you got a chance to still watch the Super Bowl  
24 yesterday.

25 THE COURT: Well, when I saw that Tom Brady was going

50

1 to win, I turned it off.

2 I'm sorry. That's terrible. You know, my law clerk, my  
3 law clerk that you can't see, Nate, he is from Ann Arbor,  
4 Michigan, University of Michigan, and he almost cried when I  
5 said I didn't like Tom Brady the other day. So, I apologize.

6 MR. POMERANTZ: Your Honor, one other comment. We  
7 had our motion to assume our nonresidential real property  
8 lease that was also on. It got missed in all the fanfare, but  
9 it was -- it has been unopposed and essentially done pursuant  
10 to stipulation. So we'd like to submit an order on that as  
11 well.

12 THE COURT: Okay. I have seen that, and I approve it  
13 under 365. You may submit the order. Okay. Thank you.

14 MR. POMERANTZ: Thank you, Your Honor.

15 THE CLERK: All rise.

16 (Proceedings concluded at 10:35 a.m.)

17 --oOo--

18

19

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from  
22 the electronic sound recording of the proceedings in the  
above-entitled matter.

23 **/s/ Kathy Rehling**

**02/09/2021**

24

25 \_\_\_\_\_  
Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

\_\_\_\_\_  
Date



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## EXHIBIT 31

	)	<b>Case No. 19-34054-sgj-11</b>
In Re:	)	Chapter 11
	)	
HIGHLAND CAPITAL	)	Dallas, Texas
MANAGEMENT, L.P.,	)	Friday, January 8, 2021
	)	9:30 a.m. Docket
Debtor.	)	
<hr/>	)	
	)	
HIGHLAND CAPITAL	)	<b>Adversary Proceeding 20-3190-sgj</b>
MANAGEMENT, L.P.,	)	
	)	
Plaintiff,	)	PRELIMINARY INJUNCTION
	)	HEARING [#2]
v.	)	
	)	
JAMES D. DONDERO,	)	
	)	
Defendant.	)	
	)	

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor/Plaintiff: John A. Morris  
PACHULSKI STANG ZIEHL & JONES, LLP  
780 Third Avenue, 34th Floor  
New York, NY 10017-2024  
(212) 561-7700

1 APPEARANCES, cont'd.:

2 For James Dondero, D. Michael Lynn  
3 Defendant: John Y. Bonds, III  
4 Bryan C. Assink  
5 BONDS ELLIS EPPICH SCHAFFER  
6 JONES, LLP  
7 420 Throckmorton Street,  
8 Suite 1000  
9 Fort Worth, TX 76102  
10 (817) 405-6900

11 For the Official Committee Matthew A. Clemente  
12 of Unsecured Creditors: SIDLEY AUSTIN, LLP  
13 One South Dearborn Street  
14 Chicago, IL 60603  
15 (312) 853-7539

16 For the Funds and Davor Rukavina  
17 Advisors: MUNSCH HARDT KOPF & HARR, P.C.  
18 500 N. Akard Street, Suite 3800  
19 Dallas, TX 75201-6659  
20 (214) 855-7554

21 For Certain Employees: Frances A. Smith  
22 ROSS & SMITH, P.C.  
23 Plaza of the Americas  
24 700 N. Pearl Street, Suite 1610  
25 Dallas, TX 75201  
(214) 593-4976

Recorded by: Michael F. Edmond, Sr.  
UNITED STATES BANKRUPTCY COURT  
1100 Commerce Street, 12th Floor  
Dallas, TX 75242  
(214) 753-2062

Transcribed by: Kathy Rehling  
311 Paradise Cove  
Shady Shores, TX 76208  
(972) 786-3063

22  
23  
24  
25 Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

1 DALLAS, TEXAS - JANUARY 8, 2021 - 9:41 A.M.

2 THE COURT: All right. We are here for Highland  
3 Capital Management, L.P. versus James Dondero, a preliminary  
4 injunction hearing. This is Adversary 20-3190.

5 All right. Let's start out by getting appearances from  
6 counsel. First, for the Plaintiff/Debtor, who do we have  
7 appearing?

8 MR. MORRIS: Your Honor, John Morris; Pachulski Stang  
9 Ziehl & Jones. I'm here with my partner, Jeff Pomerantz, and  
10 others.

11 THE COURT: All right. Good morning. All right.  
12 For Mr. Dondero, who do we have appearing?

13 MR. LYNN: Michael Lynn, together with John Bonds,  
14 for Mr. Dondero.

15 THE COURT: Good morning.

16 All right. I know we have a lot of parties in interest  
17 represented on the video or phone today. I'm not going to go  
18 through a roll call, other than I'll see if we have the  
19 Committee, the Unsecured Creditors' Committee counsel on the  
20 line. Do we have anyone appearing for them?

21 MR. CLEMENTE: Yes, good morning, Your Honor.  
22 Matthew Clemente from Sidley Austin on behalf of the  
23 Committee.

24 THE COURT: Okay. Thank you. All right.

25 MR. CLEMENTE: Thank you, Your Honor.

1 THE COURT: Well, as I said, I'm not going to do a  
2 roll call. I don't think we had any specific parties in  
3 interest, you know, file a pleading, or any other parties  
4 other than the Debtor and Mr. Dondero in this adversary. So  
5 I'll just let the others kind of listen in without appearing.

6 All right. Mr. Morris, are you going to start us off this  
7 morning with, I don't know, an opening statement or any  
8 housekeeping matters?

9 MR. MORRIS: I have both an opening statement and  
10 housekeeping matters. I just wanted to see if Mr. Pomerantz  
11 has anything he wants to convey to the Court before I begin.

12 MR. POMERANTZ: (garbled)

13 THE COURT: Mr. Pomerantz, if you could take your  
14 device off mute, please.

15 THE CLERK: He's off mute. I don't know what --

16 THE COURT: Okay. Well, we're showing you're not on  
17 mute, but we can't hear you. What now?

18 THE CLERK: He's not on mute now. He's --

19 THE COURT: Okay. Go ahead, Mr. Pomerantz.

20 (Pause.)

21 THE CLERK: He's not coming through.

22 THE COURT: We're -- you're not coming through, and  
23 we're not sure what the problem is. We're not showing you on  
24 mute.

25 (Pause.)

1 THE COURT: All right. Should we have him call back  
2 in on his phone? All right. If you could, if you have a  
3 phone, maybe you can try calling in on your phone and speak  
4 through your phone, not your computer.

5 MR. MORRIS: You know what, Your Honor? I'm going to  
6 proceed, and Mr. Pomerantz will address the Court at the  
7 conclusion of the hearing on the motion.

8 THE COURT: Okay. Very good. We usually hear him  
9 loud and clear, so I don't know what's going on this morning.  
10 Go ahead, Mr. Morris.

11 OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

12 MR. MORRIS: Yes. Thank you very much, Your Honor.  
13 John Morris; Pachulski Stang; for the Debtor.

14 We are here this morning, Your Honor, on the Debtor's  
15 motion for preliminary injunction against Mr. Dondero. We  
16 filed last night also an emergency motion for an order to show  
17 cause as to why this Court should not hold Mr. Dondero in  
18 contempt of court --

19 THE COURT: All right.

20 MR. MORRIS: -- for violating a previously-issued  
21 TRO.

22 THE COURT: Yes. Let me just interject, in case  
23 there's any confusion by anyone. I am not going to hear the  
24 motion for show cause order this morning. While I understand  
25 you think there might be some efficiency and overlap in

1 evidence, it's not enough notice. So we'll talk about  
2 scheduling that at the end of the presentations this morning.  
3 All right?

4 MR. MORRIS: Thank you for addressing that, Your  
5 Honor.

6 THE COURT: Okay.

7 MR. MORRIS: Your Honor, then let's just proceed  
8 right to the preliminary injunction motion. There is ample  
9 evidence to support the Debtor's motion for a preliminary  
10 injunction. There would have been substantial evidence to  
11 support it based on the conduct that occurred prior to the  
12 issuance of the TRO, but the conduct that did occur following  
13 the TRO only emphasizes the urgent need for an injunction in  
14 this case.

15 I want to begin by just telling Your Honor what evidence  
16 we intend to introduce here today. We filed at Docket 46 in  
17 the adversary proceeding our witness and exhibit list. The  
18 exhibit list contains Exhibits A through Y. And at the  
19 appropriate time, I will move for the admission into evidence  
20 of those exhibits.

21 The exhibit list and the witness list also identifies  
22 three witnesses for today. Mr. Dondero. Mr. Dondero is here  
23 today. Notwithstanding Your Honor's comments on December 10th  
24 and on December 16th, when I deposed him on Tuesday he was  
25 unsure whether he was going to come here today to testify.



1 And he will inform Your Honor of that on cross-examination.  
2 And so the Debtor was forced to prepare and serve a subpoena  
3 to make sure that he was here today. But Mr. Dondero is here  
4 today.

5 Following the conclusion of Mr. Dondero's deposition on  
6 Tuesday, and based in part on the evidence adduced during that  
7 deposition, the Debtor terminated for cause Scott Ellington  
8 and Isaac Leventon. We had asked counsel for those former  
9 employees to accept service of a trial subpoena so that they  
10 would appear today. We were told that they would do so if we  
11 gave them a copy of the transcript of Mr. Dondero's  
12 deposition.

13 We thought that was inappropriate and we declined to do  
14 so, and they declined to accept service of the subpoenas. We  
15 have spent two days with a professional process server  
16 attempting to effectuate service of the trial subpoenas for  
17 Mr. Ellington and Mr. Leventon, but we were unsuccessful in  
18 doing that. So we'll only have one witness today, unless we  
19 have cause to call anybody on rebuttal, and that witness will  
20 be Mr. Dondero.

21 I want to talk for a few moments as to what Mr. Dondero  
22 will testify to and what the evidence will show. Mr. Dondero  
23 will testify that he never read the TRO, Your Honor. He will  
24 testify that he didn't participate in the motion on the  
25 hearing for the TRO, that he never read Mr. Seery's

1 declaration in support of the Debtor's motion for the TRO,  
2 that he never bothered to read the transcript of the  
3 proceedings on December 10th so that he could understand the  
4 evidence that was being used against him. He had no knowledge  
5 of the terms of the TRO when he was deposed on Tuesday.

6 And that's the backdrop of what we're doing here today,  
7 because he didn't know what he was enjoined from doing, other  
8 than speaking to employees. He actually did testify and he  
9 will testify that he knew he wasn't supposed to speak with the  
10 Debtor's employees, but he spoke with the Debtor's employees  
11 in all kinds of ways, as the evidence will show.

12 The evidence will also show that Mr. Dondero violated the  
13 TRO by throwing away the cell phone that the company bought  
14 and paid for after the TRO was entered into. He's going to be  
15 unable to tell you who threw it away. He's going to be unable  
16 to tell you who gave the order to throw it away. He's going  
17 to be unable to tell you when after the TRO was entered the  
18 phone was thrown away.

19 But we do have as one fact and as I believe one violation  
20 of the TRO --

21 MR. POMERANTZ: So, I'm on a WebEx.

22 MR. MORRIS: Jeff, --

23 THE COURT: Mr. Pomerantz, we heard you. We heard  
24 you say something. So, apparently, you got your audio  
25 working.

1 All right. Mr. Morris, continue.

2 MR. MORRIS: Yeah. And what Mr. Dondero may tell  
3 you, Your Honor, is that it's really Mr. Seery's fault that  
4 the phone got thrown away, because Mr. Seery announced that  
5 all of the employees were going to be terminated at the end of  
6 January, and because Mr. Seery did that, he and I believe Mr.  
7 Ellington thought it was appropriate to just throw their  
8 phones away, without getting the Debtor's consent, without  
9 informing the Debtor, and switching the phone numbers that  
10 were in the Debtor's account to their own personal names. So  
11 that's Item No. 1.

12 Item No. 2 -- and this is in no particular order, Your  
13 Honor. I don't want you to think that I'm bringing these  
14 things up in terms of priority. But they're just the order in  
15 which they came up in the deposition, and so I'm just  
16 following it as well.

17 Item No. 2 is trespass. On December 22nd, you will hear  
18 evidence that Mr. Dondero personally intervened to yet again  
19 stop trades that Mr. Seery was trying to effectuate in his  
20 capacity as portfolio managers of the CLOs. He did that just  
21 six days after Your Honor dismissed as frivolous a motion  
22 brought by the very Advisors and Funds that he owns and  
23 controls.

24 Therefore, the very next day, the Debtor sent him a  
25 letter, sent through counsel a letter, evicting him from the

1 premises, demanding the return of the phone, and telling him  
2 that he had to be out by December 30th.

3 I was stunned, Your Honor, stunned, when I took his  
4 deposition on Tuesday and he was sitting in Highland's  
5 offices. He hadn't asked for permission to be there. He  
6 hadn't obtained consent to be there. But he just doesn't care  
7 what the Debtor has to say here. He just doesn't.

8 I don't know when he got there or when he left. I don't  
9 know if he spoke to anybody while he was there. But he just  
10 took it upon himself to show up in the Debtor's office,  
11 notwithstanding the very explicit eviction notice that he got  
12 on December 23rd.

13 Mr. Dondero, as I mentioned, clearly violated the TRO by  
14 knowingly and intentionally and purposely interfering with the  
15 Debtor's trading as the portfolio manager of the CLOs. This  
16 has just gone on too long. There have been multiple hearings  
17 on this matter, but he doesn't care. So he gave the order to  
18 stop trades that Mr. Seery had effectuated. That's a clear  
19 violation of the TRO, and it certainly supports the imposition  
20 of a preliminary injunction.

21 Mr. Seery -- Mr. Dondero is going to testify that multiple  
22 letters -- that I'm going to refer to them, Your Honor, as the  
23 K&L Gates Parties, and those are the two Advisors and the  
24 three investment funds and CLO Holdco that are all owned and/  
25 or controlled by Mr. Dondero -- after that hearing on the

1 16th, K&L Gates, the K&L Gates Parties sent not one, not two,  
2 but three separate letters. They said they may take steps to  
3 terminate the CLO management agreements. After we evicted Mr.  
4 Dondero, sent a letter suggesting that we would be held liable  
5 for damages because we were interfering with their business.

6 And Mr. Dondero is going to tell you, Your Honor, that he  
7 encouraged the sending of those letters, that he approved of  
8 those letters, that he thought those letters were the right  
9 things to send to the Debtor, even after -- even with the  
10 knowledge of what happened on December 16th.

11 He's going to tell you he knew about that hearing and he  
12 still, he still approves of those letters, and never bothered  
13 to exercise his control to have those letters withdrawn upon  
14 the Debtor's request. We asked them to withdraw it, and when  
15 they wouldn't do it, Your Honor, that's what prompted the  
16 filing of yet another adversary proceeding. And we're going  
17 to have another TRO hearing next Wednesday because they won't  
18 stop.

19 Next, a preliminary injunction should issue because Mr.  
20 Dondero violated the TRO by communicating with the Debtor's  
21 employees to coordinate their legal strategy against the  
22 Debtor. The evidence will show, in documents and in  
23 testimony, that on December 12th, while he was prohibited from  
24 speaking to any employee except in the context of shared  
25 services, you're going to see the documents and you're going

1 to hear the evidence that on December 12th Scott Ellington was  
2 actively involved in identifying a witness to support Mr.  
3 Dondero's interests at the December 16th hearing.

4 You will receive evidence that on December 15th Mr.  
5 Ellington and Mr. Leventon collaborated with Mr. Dondero's  
6 lawyers to prepare a common interest agreement.

7 You will hear evidence that on the next day, December  
8 16th, the day of that hearing, that Mr. Dondero solicited Mr.  
9 Ellington's help to coordinate all of the lawyers representing  
10 Mr. Dondero's interests, telling Mr. Ellington that he needed  
11 to show leadership, and Mr. Ellington readily agreed to do  
12 just that.

13 You will hear evidence that on December 23rd Mr. Ellington  
14 and Grant Scott communicated in connection with calls that  
15 were being scheduled with Mr. Dondero and with K&L Gates, the  
16 very K&L Gates Clients who filed the frivolous motion that was  
17 heard on December 16th and that persisted in sending multiple  
18 letters threatening the Debtor thereafter.

19 You will hear evidence that late in December Mr. Dondero  
20 sought contact information for Mr. Ellington and Mr.  
21 Leventon's lawyer, and he will tell you that he did it for the  
22 explicit purpose of advancing their mutual shared interest  
23 agreement, while they were employed by the Debtor. While they  
24 were employed by the Debtor.

25 Finally, you will hear evidence, and it will not be

1   disputed, you will see the evidence, it's on the documents,  
2   that Mr. Dondero personally intervened to stop the Debtor from  
3   producing the financial statements of Get Good and Dugaboy,  
4   two entities that he controls, that the U.C.C. had been asking  
5   for for some time, that the Debtor had been asking of its  
6   employees for some time to produce. And it was only when we  
7   got, frankly, the discovery from Mr. Dondero when there's a  
8   text message that says, Not without a subpoena.

9       The documents are on the Debtor's system. We just don't  
10   know where they are because they're hidden someplace. But Mr.  
11   Dondero knows where they are. He can certainly force -- he  
12   can certainly get them produced. And one of the things we'll  
13   be asking for when we seek the contempt motion is the  
14   production of those very documents.

15       So, Your Honor, that's what the evidence is going to show.  
16   I don't think there's going to be any question that a  
17   preliminary injunction ought to issue. But I do want to spend  
18   just a few minutes rebutting some of the assertions made in  
19   the filing by Mr. Dondero last night.

20       Of course, they offer no evidence. There is no  
21   declaration. There is no document. There is merely argument.  
22   It's been that way throughout this case. For a year, Mr.  
23   Dondero has never stood before Your Honor to tell you why  
24   something was wrong being done to him, why -- he hasn't  
25   offered to be here at all, and he's here today, again, only

1 because he got a subpoena. That's the only reason we know  
2 he's here today.

3 So let's just spend a few minutes talking about the  
4 assertions made in the document last night. Mr. Dondero  
5 complains about the scope of the injunction, and I say to  
6 myself, in all seriousness, Are you kidding me? You didn't  
7 even read the TRO and you're going to be concerned about what  
8 the scope of the injunction is? You didn't even have enough  
9 respect for the Court to read the TRO and we're going to worry  
10 about the scope of some future injunction? Doesn't make any  
11 sense to me.

12 But let's talk about the specific arguments that they  
13 make.

14 Third parties. They're concerned that somehow third  
15 parties don't have notice of the injunction. Your Honor,  
16 third parties are not impacted by the injunction. The only  
17 third parties that are impacted by the injunction are those  
18 that are owned and/or controlled by Mr. Dondero. If he  
19 doesn't tell them, that's his breach of duty. He created the  
20 Byzantine empire of over 2,000 entities, and he wants the  
21 Debtor to have the burden of notifying all of them so that  
22 they can all come in here and make 2,000 arguments as to why  
23 they shouldn't be enjoined?

24 He owns and controls them. They are the only third  
25 parties who are impacted by this proposed preliminary



1 injunction, and he has the responsibility, he has the duty to  
2 inform them, because he owns and controls them.

3 We know of the K&L Gates Parties. We know Get Good and  
4 Dugaboy are in this courtroom. We know CLO Holdco. So many  
5 of these parties have been so -- they're on the phone now.  
6 They don't have notice? It is insulting, frankly, to suggest  
7 that the Debtor somehow has some obligation to figure out who  
8 Mr. Dondero owns and controls. He should know that. That's  
9 number one.

10 Number two, there is a statement in there about employees  
11 and how he should be able to speak with them about personal  
12 and routine matters. As to that, Your Honor, he has forfeited  
13 that opportunity. He cannot be trusted. There cannot be any  
14 communication because nobody can police it. And so we think a  
15 complete bar to any discussion with any employee, except as it  
16 relates to shared services -- because we do have a contractual  
17 obligation; that's what was in it -- ought to be barred.  
18 That's number one.

19 Number two, there's a reference in the objection to Mr.  
20 Dondero's personal assistant. I'd like to know who that is,  
21 Your Honor. I wasn't aware that he still was using a personal  
22 assistant at the Debtor. I want to know specifically who that  
23 is. I don't know that they -- you know, I just -- we need to  
24 cut that off. And he should not be communicating with any  
25 employee. The Debtor should not be paying for his personal

1 assistant.

2 It's offensive to think that he's still doing that,  
3 particularly after he was terminated or his resignation was  
4 requested back in October precisely because his interests were  
5 adverse to the Debtor.

6 Number three, he's concerned that the Debtor is somehow  
7 preventing him from speaking to former employees. We now  
8 know, Your Honor, that that's a, I'm sure, a very specific  
9 reference to Mr. Ellington and Mr. Leventon. Right? He wants  
10 a green light to be able to do that. And you know, I'll leave  
11 it to Your Honor as to whether that's appropriate. I'll leave  
12 it to their counsel as to whether, going forward, colluding  
13 together against the Debtor at this point in time is in  
14 anybody's best interest. But I will -- what I will demand in  
15 the preliminary injunction is a very explicit statement that  
16 Mr. Ellington and Mr. Leventon are not to share any  
17 confidential or privileged information that they received in  
18 their capacity as general counsel and assistant general  
19 counsel of the Debtor.

20 The pot plan. He's afraid somehow the order is going to  
21 prevent him from pursuing the pot plan. He's had over a year  
22 to pursue this pot plan, Your Honor. Frankly, I don't, you  
23 know, I don't know what to say. He has never made a proposal  
24 that has gotten any traction with the only people who matter.  
25 And it's not the Debtor. It's the creditors. It's the

1 Creditors' Committee.

2 If you want to put in an exception that he can call Matt  
3 Clemente, I don't mean to put this on Mr. Clemente, he can  
4 decide whether or not that's appropriate, but the creditors  
5 are the only ones who matter here. Your Honor, it's not the  
6 Debtor.

7 And I'll let Mr. Dondero's counsel explain to Your Honor  
8 why he thinks he still needs to pursue a pot plan, and Your  
9 Honor can decide. I trust Your Honor to decide what  
10 boundaries and what guardrails might be appropriate for him to  
11 continue to pursue his pot plan.

12 That's all I have, Your Honor. Not much.

13 THE COURT: All right.

14 MR. MORRIS: But I think there's going to be --  
15 there's going to be an awful lot of evidence. This is going  
16 to be a lengthy examination. I ask the Court for your  
17 patience.

18 THE COURT: I've got --

19 MR. MORRIS: But that's all I have.

20 THE COURT: I've got all day, if we need it.

21 MR. MORRIS: Okay.

22 THE COURT: I hope we don't, but I've got all day if  
23 we need it. All right.

24 MR. MORRIS: That's what I have, Your Honor.

25 THE COURT: All right. Mr. Dondero's counsel, your

1 opening statement?

2 MR. BONDS: Your Honor, I would reserve my opening  
3 statement to the end of the hearing.

4 I would also point out that anything that Mr. Morris just  
5 said was not evidence, and we think that the evidence will  
6 show completely differently than argued or articulated by Mr.  
7 Morris.

8 THE COURT: All right.

9 MR. BONDS: That's all.

10 THE COURT: Thank you, Mr. Bonds.

11 Mr. Morris, you may call your witness.

12 MR. MORRIS: The Debtor calls James Dondero.

13 THE COURT: All right. Mr. Dondero, this is Judge  
14 Jernigan. I would ask you to say, "Testing, one, two," so we  
15 pick up your video so I can swear you in.

16 All right. Mr. Dondero, if you're speaking up, we're not  
17 hearing you, so please make sure you're unmuted and have your  
18 video --

19 (Echoing.)

20 MR. DONDERO: Hello. One, two.

21 THE COURT: Okay. We got you.

22 MR. DONDERO: One, two three.

23 THE COURT: We got you now.

24 JAMES D. DONDERO, PLAINTIFF'S WITNESS, SWORN

25 THE COURT: All right. Thank you.

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19

1 Mr. Morris, go ahead.

2 MR. MORRIS: Thank you, Your Honor.

3 (Echoing.)

4 THE COURT: I'm going to ask everyone except Mr.  
5 Dondero and Mr. Morris to put your device on mute. We're  
6 getting a little distortion.

7 All right. Go ahead.

8 DIRECT EXAMINATION

9 BY MR. MORRIS:

10 Q Good morning, Mr. Dondero. Can you hear me?

11 A Yes.

12 (Echoing.)

13 THE COURT: Ooh. Okay. We're having a little echo  
14 when you speak, Mr. Dondero. Do you have -- well, first, you  
15 have headphones. That always helps.

16 (Echoing.)

17 THE COURT: Okay. That may help as well.

18 (Pause.)

19 THE COURT: Okay. Let's try again. If you could  
20 say, "Testing, one, two."

21 THE WITNESS: Is that better?

22 THE COURT: That is better, yes.

23 All right. Go ahead.

24 THE WITNESS: Okay. Great.

25 MR. MORRIS: Thank you.

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20

1 BY MR. MORRIS:

2 Q Can you hear me, Mr. Dondero?

3 A You're a bit faint. Give me one second. Okay. Got you.

4 Q Okay. Thank you. Who is in the room with you right now?

5 A Bonds, Lynn, and a tech.

6 A VOICE: Bryan Assink.

7 THE WITNESS: Oh, is Assink here? Oh, okay, I'm  
8 sorry. All right. I'm sorry. Bonds, Lynn, and Bryan Assink.

9 BY MR. MORRIS:

10 Q Okay. You're testifying today pursuant to a subpoena,  
11 correct?

12 A Yes.

13 Q Okay.

14 MR. MORRIS: And Your Honor, that subpoena can be  
15 found at Docket No. 44 in the adversary proceeding.

16 THE COURT: All right.

17 BY MR. MORRIS:

18 Q In the absence of a subpoena, in the absence of a  
19 subpoena, you didn't know if you would show up to testify at  
20 this hearing; is that right?

21 A I -- I do what my counsel directs me to do, and I didn't  
22 know at that time whether they would direct me to come or not.

23 Q Okay. And when I -- when I deposed you earlier this week,  
24 you agreed that you may or may not testify; is that right?

25 A It depends on what counsel instructs me to do, correct. I

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21

1 didn't know at the time.

2 Q Okay. And you didn't mention anything about counsel when  
3 I asked you the questions earlier this week, correct?

4 A That was the undertone in almost all my answers, that I  
5 relied on counsel.

6 MR. MORRIS: Your Honor, I move to strike. I'm  
7 asking very specific questions. And if I need to go to the  
8 deposition transcript, I'm happy to do that.

9 THE COURT: All --

10 MR. MORRIS: Just going forward, Your Honor, this is  
11 cross-examination. It's really yes or no at this point.  
12 That's what I would request, anyway.

13 THE COURT: All right. Mr. Dondero, do you  
14 understand --

15 (Echoing.)

16 THE COURT: Do you understand what Mr. Morris was  
17 raising there? We really need you to give specific answers --  
18 and usually they're going to be yes or no answers -- to Mr.  
19 Morris's questioning. Okay? So let's try again. Mr. Morris,  
20 go ahead.

21 THE WITNESS: Yeah.

22 BY MR. MORRIS:

23 Q Mr. Dondero, you're aware that Judge Jernigan granted the  
24 Debtor's request for a TRO against you on December 10th,  
25 correct?

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22

1 A Yes.

2 Q But you never reviewed the declaration that Mr. Seery  
3 filed in support of the Debtor's motion for a TRO, correct?

4 A I relied on counsel.

5 Q Sir, you never reviewed the declaration that Mr. Seery  
6 filed in support of the Debtor's motion for a TRO, correct?

7 A Correct.

8 Q You didn't even know the substance of what Mr. Seery  
9 alleged in his declaration at the time that I deposed you on  
10 Tuesday, correct?

11 A Correct.

12 Q And that's because you didn't even think about the fact  
13 that the Debtor was seeking a TRO against you; isn't that  
14 right?

15 A No.

16 Q That's not right?

17 A No.

18 Q All right.

19 MR. MORRIS: Your Honor, could I ask my assistant,  
20 Ms. Canty, to put up on the screen what had been designated as  
21 the Debtor's Exhibit Z in connection with the motion for  
22 contempt? Exhibit Z is the transcript from Tuesday's hearing.

23 THE COURT: All right.

24 MR. MORRIS: And I would like to -- I'd like to  
25 cross-examine Mr. Dondero on his testimony on Tuesday.



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1 THE COURT: All right. You may.

2 MR. MORRIS: Can we put up Page 15, please? And go  
3 to Lines 15 through 17.

4 BY MR. MORRIS:

5 Q Sir, you recall being deposed on Tuesday by my -- by me,  
6 correct?

7 A Yes.

8 Q Okay. Did you hear this question and did you hear this  
9 answer?

10 "Q Did you care that the Debtor was seeking a TRO  
11 against you?

12 "A I didn't think about it."

13 Q Is that -- is that your testimony from the other day?

14 A Yes.

15 Q You didn't dial in to the hearing when the Court  
16 considered the Debtor's motion for a TRO against you, did you?

17 A I -- I don't recall. I don't think so.

18 Q You never read the transcript in order to understand what  
19 took place in this courtroom when Judge Jernigan decided to  
20 enter a TRO against you; isn't that right?

21 A I relied on counsel, which has been my testimony all  
22 along.

23 MR. MORRIS: Can we go to Page 13 of the transcript,  
24 please? Beginning at Line 24.

25 BY MR. MORRIS:

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1 Q (reading)

2 "Q Did you read a transcript of the hearing?

3 "A No."

4 Q Did you testify on Tuesday that you did not read a  
5 transcript of the hearing?

6 A Yes.

7 Q In fact, as of at least last Tuesday, you hadn't even  
8 bothered to read the TRO that this Court entered against you.  
9 Isn't that right?

10 MR. BONDS: Your Honor, I'm going to object.

11 (Echoing.)

12 THE COURT: Okay. We're getting that echo from you  
13 now, Mr. Bonds. So maybe you need to turn your volume down a  
14 little. But what is the basis for your objection?

15 (Echoing.)

16 MR. BONDS: Leading and rhetorical.

17 MR. MORRIS: I think it's because they're in the same  
18 room.

19 THE COURT: Okay. Do you have -- I don't know what  
20 you're doing. I guess you're moving to a different room?

21 MR. BONDS: I am, Your Honor.

22 THE COURT: Okay.

23 (Echoing.)

24 THE COURT: Okay. I'm waiting for the objection  
25 basis.

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25

1 MR. BONDS: The basis of the objection, Your Honor,  
2 is that --

3 (Echoing.)

4 THE COURT: Okay. We're going to have to do  
5 something different here. We can't have this issue for the  
6 entire hearing. Do you need to get a tech person in there, or  
7 maybe call in on your phone? I don't know.

8 MR. BONDS: Your Honor, I'm going into the conference  
9 room.

10 (Pause.)

11 THE COURT: Okay. Are we going to try again here?

12 MR. BONDS: Yes. Is this working?

13 THE COURT: Yes.

14 MR. BONDS: Perfect. Your Honor, my objection is  
15 that Mr. Dondero has already testified that he relied on his  
16 lawyers. I don't know where Mr. Morris is going with this,  
17 but it's pretty clear that Mr. Dondero simply relies on his  
18 lawyers to tell him what happened. I don't know that that's  
19 that different than any other layperson.

20 MR. MORRIS: Your Honor, if this is --

21 THE COURT: Well, --

22 MR. MORRIS: If I may?

23 THE COURT: Yes.

24 MR. MORRIS: I believe it's terribly relevant to know  
25 how seriously Mr. Dondero takes this Court and this Court's

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1 proceedings and this Court's orders. If the Court decides  
2 that it doesn't matter whether or not he read the transcript,  
3 you're the fact-finder and you'll make that decision. But I  
4 believe it's at least relevant.

5 THE COURT: Okay. I agree and I overrule the  
6 objection.

7 Go ahead.

8 BY MR. MORRIS:

9 Q Mr. Dondero, as of at least Tuesday, you never bothered to  
10 read the TRO that was entered against you, correct?

11 A I'm sorry. We're dealing with some tech stuff here for a  
12 second. Can you repeat the question?

13 Q Yes.

14 (Echoing.)

15 Q As of Tuesday, you had not bothered to read the TRO that  
16 was entered against you?

17 (Echoing.)

18 MR. MORRIS: Your Honor, can we take a break? I  
19 can't do this. I just --

20 THE COURT: Okay. I agree. Okay. Mr. Bonds, what  
21 do we need to do to fix these technical problems? Do I need  
22 to get my IT guy in here and help you? This is terrible.  
23 This connection is terrible. And I understand people have  
24 technical problems sometimes, but we've been doing these video  
25 hearings since March, so --

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1 MR. BONDS: Your Honor, I have simply gone to another  
2 conference room. The Debtor (garbled) I think that Mr.  
3 Dondero should be fine.

4 THE COURT: Okay. I don't know what you said except  
5 that you think Mr. Dondero should be fine. I --

6 MR. MORRIS: Is there anybody in that room with a  
7 cell phone on, Mr. Dondero?

8 THE WITNESS: No.

9 MR. BONDS: And I'm completely over in --

10 THE COURT: Okay.

11 MR. MORRIS: Can I try and proceed?

12 THE COURT: Try to proceed.

13 MR. MORRIS: Okay.

14 (Echoing.)

15 BY MR. MORRIS:

16 Q Mr. Dondero, as of Tuesday you only had a general view of  
17 what this Court restrained you from doing; is that correct?

18 (Echoing.)

19 MR. MORRIS: I'd still -- I -- there's too much  
20 noise, Your Honor. I can't do it.

21 THE COURT: Okay. We're going to take a five-minute  
22 break. Mr. Bonds, can you get a technical person there to  
23 work through these problems?

24 And Mike, let's get Bruce up here to --

25 THE CLERK: It's because they're in the same room.

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1 That's the problem.

2 THE COURT: They're -- they're --

3 THE CLERK: Judge Jernigan, this is Traci. Bruce is  
4 on his way up there.

5 THE COURT: Thank you.

6 Mike, explain it to me, because I don't understand.

7 You're saying if they have two devices on in the same room?

8 THE CLERK: The same -- that's the problem. They're  
9 so close. And they're trying to use the same device, give it  
10 back to you.

11 A VOICE: He has a phone on in the room.

12 MR. MORRIS: I asked that question.

13 THE COURT: Okay.

14 MR. MORRIS: Please instruct the witness to exclude  
15 everybody from the room, to turn off all electronic devices  
16 except the device that's being used for this (garbled). At  
17 least have --

18 THE COURT: All right. So, the consensus of more  
19 technical people than me is you've got two devices on in the  
20 same room and that's what's causing the distortion and echo.  
21 So I don't know if it's somebody's phone that needs to be  
22 turned off or if you have two iPads or laptops.

23 (Court confers with Clerk.)

24 (Pause.)

25 MR. BONDS: I think I'm unmuted. Can people hear me?

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1 THE WITNESS: Yes.

2 (Pause.)

3 THE COURT: Okay. Bruce, can you walk their office  
4 through? They have, I think, two devices in the same room.  
5 It's a horrible echo. So, Mr. Bonds or some --

6 MR. BONDS: Yes, Your Honor.

7 THE COURT: We have a lawyer and the lawyer's client  
8 who is testifying right now in the same room.

9 I.T. STAFF: Uh-huh.

10 THE COURT: And --

11 I.T. STAFF: Yeah. Yeah. Because -- is one a call-  
12 in user on a telephone?

13 THE COURT: I don't know. I don't --

14 I.T. STAFF: Yeah. Whatever's coming -- the audio is  
15 feeding back in. They need to separate if they're both on.  
16 Or just use one and the attorney can slide over and the client  
17 can --

18 THE COURT: Okay.

19 I.T. STAFF: -- go in his place. Just use one --

20 THE COURT: Our IT person is confirming what everyone  
21 else has been saying, that you really can only have one device  
22 in the same room. It's just unavoidable, the echoing.

23 I.T. STAFF: Unless everybody has --

24 THE COURT: Unless everyone has headphones on.

25 I.T. STAFF: Right.

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1 THE COURT: So we either need everyone to have  
2 headphones on, or one device in the room. And you all,  
3 awkward as it is, just have to share. Or I guess you could  
4 have two laptops, but one person has to --

5 I.T. STAFF: Has to have a headset.

6 THE COURT: Has to --

7 I.T. STAFF: Because the other one, the audio is  
8 going to be feeling into the microphone of the other one.

9 THE COURT: Okay. So, Mr. Bonds, I don't know if  
10 you've heard any of that, but --

11 THE CLERK: He needs to unmute himself.

12 THE COURT: You're on mute, Mr. Bonds.

13 MR. BONDS: I'm sorry, Your Honor. I'm going to sit  
14 next to Mr. Dondero and answer any questions that may come up.

15 THE COURT: Okay.

16 MR. BONDS: If any objections --

17 THE COURT: Okay. So we're going to have one device?

18 MR. BONDS: Yes.

19 THE COURT: Okay. Let's try again.

20 Okay. Go ahead, Mr. Morris.

21 BY MR. MORRIS:

22 Q Mr. Dondero, is Mr. Ellington listening to this hearing?

23 THE COURT: I didn't hear you, Mr. Morris. What?

24 BY MR. MORRIS:

25 Q Mr. Dondero, is Mr. Ellington listening to this hearing?



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1 A I have no idea.

2 Q Is Mr. Leventon listening to this hearing?

3 A I have no idea. I haven't spoken with him.

4 Q Okay. So let's try again. At least as of today, you  
5 never bothered to read the TRO that was entered against you,  
6 correct?

7 A Correct.

8 Q As of Tuesday, you only had a general understanding of  
9 what the Court restrained you from doing, correct?

10 (Echoing.)

11 A I had an adequate understanding.

12 Q You had a what?

13 A Adequate understanding.

14 Q Your understanding --

15 A VOICE: Your Honor?

16 BY MR. MORRIS:

17 Q -- was that you were prohibited from speaking to the  
18 Debtor's board without counsel and from speaking to the  
19 Debtor's employees; is that right?

20 A No.

21 Q Okay.

22 MR. MORRIS: Can we go to Page 13, Line 8, please?

23 BY MR. MORRIS:

24 Q Were you asked this question and did you give this answer?

25 "Q Tell me your understanding of what the temporary

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1       restraining order restrains you from doing.

2       "A    To talk to Independent Board directly or talking  
3       directly with employees.

4       "Q    Is there any other aspect of the temporary  
5       restraining order that you're aware of that would  
6       otherwise constrain or restrain your conduct?

7       "A    Those are the points I (garbled)."

8    Q    Did you give those answers to the questions that I asked?

9    A    Yes.

10   Q    And even with that general understanding, you went ahead  
11   and communicated directly (garbled) employees many, many, many  
12   times after the TRO was entered?

13   A    Only with regard to shared services, pot plan, and  
14   Ellington, the settlement counsel.

15   Q    Does the restraining order permit you to speak with  
16   Debtor's employees about the pot plan?

17       (Echoing.)

18       THE COURT:   Mr. Morris, let me stop.

19       MR. MORRIS:   Yeah.   I appreciate that, Your Honor.

20       THE COURT:   Even --

21       MR. MORRIS:   It's not working.

22       THE COURT:   Even your sound is not coming through  
23   clearly.   And I think it's the echo coming out of their  
24   speakers, Mr. Dondero and Mr. Bonds' speakers.   But before we  
25   conclude that, would you turn off your video and ask your

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1 question again and see if it's any better, just to confirm  
2 it's not a bandwidth issue on your end? I doubt it is, but --  
3 okay. So, try asking your question again, and I'm going to  
4 see if it's still distorted.

5 BY MR. MORRIS:

6 Q There's nothing in the TRO that permitted you to speak  
7 with Debtor employees about the pot plan, correct?

8 THE COURT: Okay. Mr. Morris, it's not at your end.  
9 It's -- it's their end. Okay. So you can turn your video  
10 back on.

11 Mr. Bonds?

12 MR. BONDS: Yes, ma'am.

13 THE COURT: You all are going to have to use earbuds,  
14 apparently. We're getting -- we're getting a feedback loop,  
15 okay? Whenever Mr. Morris talks or I talk, we're hearing  
16 ourselves echo through your speakers.

17 MR. BONDS: Can you check right now to see if it's  
18 true, if we're experiencing the same problem?

19 THE WITNESS: In other words, is this better? We  
20 unplugged the cord here.

21 THE COURT: Well, when you all speak, it's -- it's  
22 better now. But when --

23 MR. MORRIS: It is better.

24 THE COURT: But when Mr. Morris asks a question, it's  
25 echoing through your speakers. But I don't hear myself

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1 echoing through your speakers.

2 I.T. STAFF: Can Mr. Morris say something, please?

3 THE COURT: Mr. Morris, say something.

4 MR. MORRIS: They may have solved the problem. They  
5 may have solved the problem. How's that?

6 THE COURT: Okay. I think the problem is solved,  
7 whatever you did, so let's try once again.

8 Go ahead, Mr. Morris. Repeat your last question. I  
9 didn't hear it.

10 BY MR. MORRIS:

11 Q Mr. Dondero, the temporary restraining order doesn't  
12 permit you to speak with the Debtor's employees about a pot  
13 plan; isn't that right?

14 A There was a presentation on the pot plan given to the  
15 Independent Board after the restraining order was put in  
16 place. What are you implying, that that wasn't proper?

17 MR. MORRIS: Your Honor, I move to strike. It's a  
18 very simple question.

19 THE COURT: Okay. Sustained. If you could just  
20 answer the specific question, Mr. Dondero.

21 THE WITNESS: I don't know.

22 BY MR. MORRIS:

23 Q Fair enough. Sir, let's talk about some of the events  
24 that led up to the imposition of the TRO. I appreciate the  
25 fact that you hadn't read Mr. Seery's declaration or any of

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1 the evidence that was submitted in connection with the TRO, so  
2 let's spend some time talking about that now. CLO stands for  
3 Collateralized Loan Obligation, correct?

4 A Yes.

5 Q And the Debtor is party to certain contracts that give it  
6 the exclusive right and responsibility to manage certain CLOs,  
7 correct?

8 A Yes.

9 Q NexPoint Advisors, LP is an advisory firm. Do I have that  
10 right?

11 A Yes.

12 Q And we can refer to that, that firm, as NexPoint; is that  
13 fair?

14 A Yes.

15 Q You have a direct or indirect ownership interest in  
16 NexPoint, correct?

17 A Yes.

18 Q You're the president of NexPoint; isn't that right?

19 A Yes.

20 Q And as the president of NexPoint, it's fair to say that  
21 you control that entity, correct?

22 A To a certain extent.

23 Q Sir, as the president of NexPoint, it's fair to say that  
24 you control that entity, correct?

25 A To a certain extent.

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1 MR. MORRIS: Can we go to Page 18 of the transcript,  
2 please? Lines 19 and 21.

3 BY MR. MORRIS:

4 Q Were you asked this question and did you give this answer?

5 "Q As the president of NexPoint, it's fair to say  
6 that you control that entity?

7 "A Generally."

8 Q Is that the right answer that you gave the other day?

9 A I think it's similar to what I just said, yeah, yeah.

10 Q Sir, you're familiar with Highland Capital Management Fund  
11 Advisors, LP; is that right?

12 A Yes.

13 Q And we'll call that Fund Advisors; is that fair?

14 A Yes.

15 Q And we'll refer to Fund Advisors and NexPoint together as  
16 the Advisors; is that okay?

17 A Yes.

18 Q Fund Advisors is also an advisory firm, correct?

19 A Yes.

20 Q You have a direct or indirect ownership interest in Fund  
21 Advisors, correct?

22 A Yes.

23 Q You're the president of Fund Advisors, correct?

24 A Yes.

25 Q And you also have an ownership interest in the general

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1 partner of Fund Advisors; isn't that right?

2 A I believe so.

3 Q It's fair to say that you control Fund Advisors, correct?

4 A Generally.

5 Q NexPoint and Fund Advisors manage certain investments

6 funds; is that right?

7 A Yes.

8 Q Among the funds that they manage are High Point Income

9 Fund; is that right?

10 A I don't think that's a name that we manage.

11 Q Let's put it this way. There are three funds that are

12 represented by K&L Gates that are managed by the Advisors,

13 correct?

14 A I don't know.

15 Q Okay. You're the portfolio manager of the investment

16 funds advised by NexPoint and Fund Advisors, correct?

17 A Largely.

18 Q And NexPoint and Fund Advisors caused the investment funds

19 that they manage to invest in CLOs that are managed by the

20 Debtors, correct?

21 A Years ago, they bought the equity interests, if that -- if

22 that's what you're asking me, in various CLOs.

23 Q The two Advisors that you own and control caused the

24 investment funds to purchase interests in CLOs that are

25 managed by the Debtor, correct?

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1 A Not recently. Not recently. Years ago. Yes.

2 Q And they still hold those interests today, correct?

3 A Yes.

4 Q And K&L Gates represents all of those entities, correct?

5 A Yes.

6 Q And we'll call those the K&L Gates Clients; is that fair?

7 A Yes.

8 Q Before the TRO was entered, the K&L Gates Clients sent two  
9 letters to the Debtor concerning the Debtor's management of  
10 certain CLOs, right?

11 A Yes.

12 Q Okay.

13 MR. MORRIS: Your Honor, I just want to take a moment  
14 now, because we're going to start to look at some documents.  
15 The Debtor would respectfully move into evidence Exhibits A  
16 through Y that are on their exhibit list.

17 THE COURT: All right.

18 MR. BONDS: Your Honor, we have no objection.

19 THE COURT: A through Y are admitted. And for the  
20 record, these appear at Docket No. 46 in this adversary.

21 (Plaintiff's Exhibits A through Y are received into  
22 evidence.)

23 MR. MORRIS: Okay. Can we please put up Exhibit B as  
24 in boy? (Pause.) Ms. Canty? If you need a moment, just let  
25 us know.



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1 MS. CANTY: Yeah. I'm pulling it up right now.

2 MR. MORRIS: Thank you. (Pause.) Can you scroll  
3 down just a bit?

4 BY MR. MORRIS:

5 Q All right. Can you see this letter was sent on October  
6 16th?

7 A Yes.

8 Q And we see the entities that are reflected on this letter.  
9 We've got Highland Capital Management, LP. That's the  
10 question that they're asking. And the questions and the  
11 statements are being asserted on behalf of NexPoint Advisors,  
12 LP. Do you see that?

13 A Yes.

14 Q And Highland Capital Management Fund Advisors, LP. Those  
15 are the two Advisors that you own and control, correct?

16 A Control to a large extent.

17 Q Okay.

18 MR. MORRIS: And can we put up Exhibit C, please?

19 BY MR. MORRIS:

20 Q This is a second letter sent by NexPoint on November 24th.  
21 Do you see that?

22 A Yes.

23 Q Okay. And you're familiar with the substance of these  
24 letters, correct?

25 A Yes.

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1 Q And you were familiar -- you were aware of these letters  
2 before they were sent. Is that correct?

3 A Yes.

4 Q And you generally discussed the substance of these letters  
5 with NexPoint; is that right?

6 A Generally, yes.

7 Q And you discussed the substance of the letters with the  
8 Advisors' internal counsel; is that right?

9 A Yes.

10 Q That's D.C. Sauter?

11 A Yes.

12 Q And you have been on some calls with K&L Gates about these  
13 letters, right?

14 A I believe so.

15 Q And you knew these letters were being sent, correct?

16 A Yeah, they're -- they're reported.

17 Q You knew these letters for being sent; isn't that right,  
18 sir?

19 A Yes.

20 Q And you didn't object to the sending of these letters,  
21 correct?

22 A No.

23 Q In fact, you supported the sending of these letters. Is  
24 that right?

25 A Yes.

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1 Q And you have never directed NexPoint to withdraw these  
2 letters, correct?

3 A No.

4 Q Around Thanksgiving, you learned that Mr. Seery had given  
5 a direction to sell certain securities owned by the CLOs  
6 managed by the Debtors, correct?

7 A Yes.

8 Q And when you learned that, you personally intervened to  
9 stop the trades, correct?

10 A Yes. I believe they were inappropriate.

11 MR. MORRIS: I move to strike the latter part of the  
12 answer, Your Honor.

13 THE COURT: It's stricken.

14 MR. MORRIS: Can we put up Exhibit D, please?

15 BY MR. MORRIS:

16 Q We looked at this email string the other day. Do you  
17 recall that?

18 A Yes.

19 MR. MORRIS: Can we start at the bottom, please?

20 BY MR. MORRIS:

21 Q There's an email from Hunter Covitz. Do you see that?

22 A Yes.

23 Q Now, this is November 24th. It's before the TRO. Is that  
24 fair?

25 A Yes.

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1 Q Mr. Covitz is an employee of the Debtor, right?

2 A I believe so.

3 Q And Mr. Covitz helps manage the CLOs on behalf of the  
4 Debtor. Is that your understanding?

5 A Yes.

6 Q And Mr. Covitz in this email is giving directions to Matt  
7 Pearson and Joe Sowin to sell certain securities held by the  
8 CLOs. Is that correct?

9 A No. He's giving Jim Seery's direction.

10 MR. BONDS: And Your Honor, I'm going to object.  
11 This is all before the TRO was ever entered. It doesn't have  
12 anything to do with today's hearing.

13 THE COURT: Overruled.

14 MR. MORRIS: May I respond, Your Honor?

15 THE COURT: I --

16 MR. MORRIS: Okay. Thank you.

17 THE COURT: I think it's relevant. Go ahead.

18 MR. MORRIS: Thank you. Okay.

19 BY MR. MORRIS:

20 Q Mr. Seery is the CEO of the Debtor; is that right?

21 A Yes.

22 Q And the Debtor is the contractual party with the CLOs  
23 charged with the exclusive responsibility of managing the  
24 CLOs, correct?

25 A I don't believe so. The Debtor is in default of the

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1 agreements.

2 MR. MORRIS: I move to strike, Your Honor.

3 THE COURT: Sustained.

4 BY MR. MORRIS:

5 Q Sir, the Debtor has the exclusive contractual right and  
6 obligation to manage the CLOs, correct?

7 A I don't agree with that.

8 Q Okay.

9 MR. MORRIS: Can we scroll up to the -- just --

10 BY MR. MORRIS:

11 Q Do you see that Mr. Pearson acknowledges receipt of Mr.  
12 Covitz's email?

13 A Yes.

14 Q And you received a copy of Mr. Covitz's email, did you --  
15 did you not?

16 A Yes.

17 MR. MORRIS: Can you scroll up a little bit, please?

18 BY MR. MORRIS:

19 Q And can you just read for Judge Jernigan your response  
20 that you provided to Mr. Pearson, Mr. Covitz, and Mr. Sowin on  
21 November 24th?

22 A (reading) No, do not.

23 Q You instructed the recipients of Mr. Covitz's email not to  
24 sell the SKY securities as had been specifically instructed by  
25 Mr. Seery, correct?

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1 A Yes.

2 Q And you understood when you gave that instruction that the  
3 people on the email were trying to execute trades that Mr.  
4 Seery had authorized, correct?

5 A No. I -- no, that isn't how I would describe it.

6 MR. MORRIS: A second, Your Honor?

7 THE COURT: Okay.

8 (Pause.)

9 BY MR. MORRIS:

10 Q Sir, when you gave the instruction reflected in this  
11 email, you knew that you were stopping trades that were  
12 authorized and directed by Mr. Seery, correct?

13 A I don't think -- I -- I wasn't -- I wasn't sure at the  
14 moment I did that. I didn't find out until later that it was  
15 Seery who directed it.

16 MR. MORRIS: Can we please go back to the deposition  
17 transcript, Debtor's Exhibit Z, at Page 42? Line 12.

18 BY MR. MORRIS:

19 Q Were you asked this question and did you give this answer?

20 "Q At the time that you gave the instruction, "No, do  
21 not," you knew that you were stopping trades that had  
22 been authorized and directed by Mr. Seery, correct?

23 "A Yes."

24 Q Did you give that answer to my question on Tuesday?

25 A I'd like to clarify it, but yes, I did give that answer.

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1 Q Okay. You didn't speak with Mr. Seery before sending your  
2 instructions interfering with his trade, the trades that he  
3 had authorized, correct?

4 A No, I did not.

5 Q And you took no steps to seek the Debtor's consent before  
6 instructing the recipients of your email to stop executing the  
7 SKY transactions that had been authorized by Mr. Seery,  
8 correct?

9 A I'm sorry. Can you repeat the question?

10 Q You took no steps to seek the Debtor's consent before  
11 stepping in to stop the trades that Mr. Seery had authorized,  
12 correct?

13 A I took other actions instead.

14 Q Okay. But you didn't seek the Debtor's consent? That's  
15 not one of the actions you took, right?

16 A No, I educated the traders as to why it was inappropriate.

17 MR. MORRIS: I move to strike, Your Honor.

18 THE COURT: Sustained.

19 BY MR. MORRIS:

20 Q Sir, did you seek the Debtor's consent before stepping in  
21 to stop the trades that Mr. Seery had authorized?

22 A No, I did not seek consent.

23 Q In response to your instruction, Mr. Pearson canceled all  
24 of the trades that Mr. Seery had authorized, correct?

25 A Yes.

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1 MR. MORRIS: Can we go back to the exhibit, please?

2 And if we could just scroll -- stop right there.

3 BY MR. MORRIS:

4 Q That's -- that's Mr. Pearson's response to your email,

5 confirming that he had canceled both the SKY and the AVAYA

6 trades that had not yet been executed, correct?

7 A Yes.

8 MR. MORRIS: Can we scroll to the response to that?

9 BY MR. MORRIS:

10 Q Is this your response?

11 A Yes.

12 Q Can you read that aloud, please?

13 A (reading) HFAM and DAF have instructed Highland in

14 writing not to sell any CLO underlying assets. There is

15 potential liability. Don't do it again, please.

16 Q The writings that you're referring to are the two letters

17 from NexPoint, Exhibits B and C that we just looked at,

18 correct?

19 A Yeah. There might have been a third letter. I don't

20 know. But, yes, generally, those letters.

21 Q Okay. And at this juncture, the reference to potential

22 liability was a statement intended for Mr. Pearson. Is that

23 correct?

24 A Um, I -- no. Pearson wouldn't have had any personal

25 liability. It was -- it was meant for the -- there was



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1 potential liability to the Debtor or to the compliance  
2 officers at the Debtor.

3 MR. MORRIS: Can we go to Page 45 of the deposition  
4 transcript, please? Line -- beginning at Line 11, through 18.

5 BY MR. MORRIS:

6 Q Did I ask these questions and did you give these answers?

7 "Q Do you see the reference there in the latter  
8 portion of your email, 'There is potential liability.  
9 Don't do it again'?

10 "A Yes.

11 "Q Who was the intended recipient of that message?

12 "A At this juncture, it's Matt Pearson, I believe."

13 Q Did you give those answers to my questions on Tuesday?

14 A Yeah. That's not inconsistent.

15 MR. MORRIS: Let's go back to the email, please.

16 BY MR. MORRIS:

17 Q Mr. Sowin responded to your email; is that right?

18 MR. MORRIS: Can we scroll up?

19 BY MR. MORRIS:

20 Q Okay. Who's Mr. Sowin?

21 A He's the head trader.

22 Q Who's he employed by?

23 A I believe he's employed by HFAM but not the Debtor.

24 Q Okay. So he's -- he's somebody who's employed by one of  
25 the Advisors; is that right?

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1 A I believe so.

2 Q And Mr. Sowin responded to your email and he indicated  
3 that he would follow your instructions. Is that right?

4 A Yeah. He understands that it's inappropriate. That's  
5 what he's reflecting. Yes.

6 MR. MORRIS: I move to strike, Your Honor.

7 THE COURT: Sustained.

8 BY MR. MORRIS:

9 Q Sir, Mr. Sowin responded and indicated that he would  
10 follow your instructions, correct?

11 A (no audible response)

12 Q Did you answer? I'm sorry.

13 A No, I didn't answer. It's -- I don't know if you could  
14 expressly say that from that email. Maybe we should read the  
15 email.

16 MR. MORRIS: Let's just move on, Your Honor.

17 THE COURT: Okay.

18 BY MR. MORRIS:

19 Q A few days later, you learned -- you learned that Mr.  
20 Seery was trying a workaround to effectuate the trades anyway,  
21 correct?

22 A I believe so.

23 Q Uh-huh. And when you learned that, you wrote to Thomas  
24 Surgent; is that right?

25 A I -- I believe so.

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1 Q I don't -- I don't mean to -- this is not a test here.

2 MR. MORRIS: Can we just scroll up to the next email,  
3 please? Okay. Stop right there.

4 BY MR. MORRIS:

5 Q When you -- when you learned that Mr. Seery was trying a  
6 workaround, you wrote to Mr. Surgent when you learned that,  
7 right?

8 A Yes.

9 Q And Mr. Surgent is an employee of the Debtor; is that  
10 correct?

11 A I believe he's still the chief compliance officer of the  
12 Debtor.

13 Q Okay. Now, as a factual matter, you never asked Mr. Seery  
14 why he wanted to make these trades; isn't that right?

15 A I -- I did not.

16 Q Okay. And before the TRO was entered, there was nothing  
17 that prevented you from picking up the phone and asking Mr.  
18 Seery why he wanted to make these trades, correct?

19 A That's not true.

20 MR. MORRIS: One second, please, Your Honor.

21 THE COURT: Okay.

22 (Pause.)

23 MR. MORRIS: Can we go to Page 60 of the transcript?  
24 Mr. Bonds says -- beginning at Line 14. There is an objection  
25 there, Your Honor, and I would ask that the Court rule on the

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1 objection before I read from the transcript.

2 THE COURT: Okay.

3 MR. MORRIS: There you go.

4 THE COURT: (sotto voce) (reading) Is there  
5 anything that you're aware of that prevented you from picking  
6 up the phone and asking Mr. Seery for his business  
7 justification for these trades prior to December 10.  
8 Objection, form.

9 I overrule the objection to the form of that question.

10 MR. MORRIS: Okay.

11 BY MR. MORRIS:

12 Q Mr. Dondero, were you asked this question and did you give  
13 this answer?

14 "Q Is there anything that you're aware of that  
15 prevented you from picking up the phone and asking Mr.  
16 Seery for his business justification for these trades  
17 prior to December 10, 2010?

18 "A No. I expressed my disapproval via email."

19 Q Is that right?

20 A I'd like to adjust that answer to the answer I just gave.

21 Q Okay.

22 MR. MORRIS: And I move to strike.

23 BY MR. MORRIS:

24 Q I'm just asking you if that's the answer you gave on  
25 Tuesday.

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1 THE COURT: Sustained.

2 THE WITNESS: Yes.

3 BY MR. MORRIS:

4 Q Thank you. Now, you wrote to Mr. Surgent because you  
5 wanted to remind him of his personal liability for regulatory  
6 breaches and for doing things that aren't in the best interest  
7 of investors, correct?

8 A Yes.

9 Q And you actually thought about this and you -- because you  
10 didn't believe that Mr. Surgent had extra insurance and  
11 indemnities like Mr. Seery, right?

12 A No.

13 Q Didn't you testify to that the other day?

14 A I don't remember, but that isn't the only reason.

15 Q I didn't ask you if it was the only reason. Listen  
16 carefully to my question. Did you send this email because you  
17 -- because you wanted to remind him of his personal liability  
18 for regulatory breaches and for doing things that aren't in  
19 the -- I apologize. Withdrawn.

20 You did not believe at the time that you sent this email  
21 that he, Mr. Surgent, had insurance and indemnities like Mr.  
22 Seery, correct?

23 A Yes.

24 Q Okay.

25 MR. MORRIS: Can we go back to the email, please?

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1 BY MR. MORRIS:

2 Q Can you just read the entirety of your email to Mr.

3 Surgent out loud?

4 A (reading) I understand Seery is working on a workaround  
5 to trade these securities anyway, trades that contradict  
6 investor desires and have no business purpose or investment  
7 rationale. You might want to remind him and yourself that the  
8 chief compliance officer has personal liability.

9 Q Okay. That's -- that's the message you wanted to convey  
10 to Mr. Surgent, right?

11 A Yes.

12 Q And, again, you never bothered to ask Mr. Seery what his  
13 businessperson -- purpose or investment rationale was,  
14 correct?

15 A I -- I didn't believe I could talk to him directly.

16 Q This is before the --

17 A That's why I never picked up the phone.

18 Q Okay. You intended to convey the message to Mr. Surgent  
19 that, by following Mr. Seery's orders to execute the trades,  
20 that Mr. Surgent faced personal liability, correct?

21 A Yes, he does.

22 Q And that's the message you wanted to send to him, right?

23 A It's a true and accurate message, yes.

24 Q Okay. Just a few days earlier, you also threatened Mr.  
25 Seery, right?

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1 A I wouldn't use the word "threatened."

2 Q Okay. Let's let -- let's let it speak for itself.

3 MR. MORRIS: Can we go to Exhibit E, please? Keep  
4 scrolling down just a bit.

5 BY MR. MORRIS:

6 Q This is an email that you sent to Mr. Seery on November  
7 24th. And as always, Mr. Dondero -- this is the third time  
8 we're meeting -- if there's something in the document that you  
9 need to see, please just let me know, because I don't -- I  
10 don't mean to test your memory if the document can help  
11 refresh your recollection.

12 MR. MORRIS: Can we just scroll up a little bit  
13 further to the top to see the date?

14 BY MR. MORRIS:

15 Q Okay. So, Jim, there, JD, who is that?

16 A That's me.

17 Q Okay. And can you tell by the substance of the email, of  
18 the text messages, this is communications between you and Mr.  
19 Seery, right?

20 A Yes.

21 Q Okay. And you see that it's dated November 24th there?

22 A Yes. Right after we were discussing the pipeline. Or  
23 right when we were working on the pipeline.

24 Q Okay.

25 MR. MORRIS: Can you scroll down a little bit,

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1 please?

2 BY MR. MORRIS:

3 Q At 5:26 p.m., you sent Mr. Seery a text, correct?

4 A Yes.

5 Q Can you read that, please?

6 A (reading) Be careful what you do. Last warning.

7 Q Okay. This was a warning telling Mr. Seery to stop  
8 selling assets out of the CLOs or the beneficial owners would  
9 take more significant action against him, correct?

10 A It was a general statement that what he was doing was  
11 regulatorily inappropriate and ethically inappropriate and he  
12 was in breach of the contracts he was operating.

13 Q Neither you nor any entity owned or controlled by you are  
14 parties to the contracts you just referred to; isn't that  
15 correct?

16 A I believe they're indirectly parties to those contracts,  
17 especially when they're in default.

18 Q Neither you nor any entity owned or controlled by you is a  
19 signatory to any CLO management contract pursuant to which the  
20 Debtor is a party, correct?

21 A I -- I don't know and I don't want to make legal  
22 conclusions on that.

23 Q Okay. At the deposition the other day, some of the things  
24 that you suggested the beneficial owners of the CLO interests  
25 might do against Mr. Seery and the Debtor are class action



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1 lawsuits. Is that right?

2 A I -- I did not suggest the entities I control would do  
3 that. If anybody on this call were to call a class action  
4 lawsuit -- a class action law firm and tell them what's been  
5 going on with the CLOs, I think a class action law firm would  
6 file it on their own regard, not on the behalf of my entities.

7 MR. MORRIS: I move to strike, Your Honor.

8 THE COURT: Sustained.

9 BY MR. MORRIS:

10 Q Let's talk about that cell phone. Okay? Until at least  
11 December 10th, the day the TRO was entered, you had a cell  
12 phone that was bought and paid by the Debtor, right?

13 A Yes.

14 Q But sometime after December 10th, your phone was disposed  
15 of or thrown in the garbage; is that right?

16 A Yes.

17 Q And you don't know when after December 10th the cell phone  
18 that was the Debtor's property was disposed of, right?

19 A I don't believe at that point it was the Debtor's  
20 property. I think I paid it off in full and the Debtor had  
21 announced that they were canceling everybody's cell phones so  
22 it was appropriate for me to get another one.

23 MR. MORRIS: I move to strike, Your Honor.

24 THE COURT: Sustained.

25 MR. BONDS: Your Honor, at some point, I mean, Mr.

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1 Morris just ought to go on and testify.

2 MR. MORRIS: No, this is Mr. Dondero's testimony,  
3 Your Honor. He gave it the other day. I'm just asking him to  
4 confirm it, basically.

5 THE COURT: Okay. I overrule the objection, if any  
6 there was, on the part of Mr. Bonds.

7 BY MR. MORRIS:

8 Q Sometime after December 10th, the cell phone that prior to  
9 that time had been owned and paid for by the Debtor was thrown  
10 in the garbage or otherwise disposed of, correct?

11 A Yes.

12 Q And you don't know when after December 10th that was --  
13 the phone was disposed of, correct?

14 A It was on or about that date, I'm sure.

15 Q Well, we know it was after December 10th, right?

16 A Okay. Or about that date.

17 Q You testified the other day that you just don't know who  
18 made the decision to throw your phone away, right?

19 A I could find out, but I don't know. I would have to talk  
20 to employees.

21 Q Did you make any request of the Debtor since your  
22 deposition to try to find out the answer as to who made the  
23 decision to throw your phone away?

24 A No.

25 Q How did you learn that your phone was thrown away?

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1 A As I testified, it's standard operating procedures every  
2 time a senior executive gets a new phone.

3 Q Hmm. You don't know exactly who threw the phone away; is  
4 that right?

5 A No, but I can find out.

6 Q Okay. I'm just asking -- I'm not asking you to find out.  
7 I'm just asking you if you know. Do you know who threw your  
8 phone away?

9 A No.

10 Q Do you know who made the decision to throw your phone  
11 away?

12 A It -- there wasn't a decision. It was standard operating  
13 procedure.

14 MR. MORRIS: I move to strike.

15 THE COURT: Sustained.

16 BY MR. MORRIS:

17 Q You and Mr. Ellington disposed of your phones at the same  
18 time, correct?

19 A I don't have specific awareness regarding what Mr.  
20 Ellington did with his phone.

21 Q It never occurred to you to get the Debtor's consent  
22 before throwing the phone that they had purchased away, right?

23 A I'm not permitted to talk to the Debtor.

24 Q Sir, it never occurred to you to get the Debtor's consent  
25 before throwing the phone away, correct?

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1 A I'm going to stick with the answer I just gave.

2 MR. MORRIS: Can we go to Page 75 of the transcript?  
3 Lines 12 through 15. There is an objection there, Your Honor.  
4 I would respectfully request that the Court rule on the  
5 objection before I read the testimony.

6 THE COURT: Okay. Starting at Line 12?

7 MR. MORRIS: 12.

8 THE COURT: (sotto voce) (reading) Did it ever  
9 occur to you to get the Debtor's consent before doing this?  
10 Objection, form.

11 That objection is overruled.

12 BY MR. MORRIS:

13 Q All right. Mr. Dondero, did you give this answer to my  
14 question on Tuesday?

15 "Q Did it ever occur to you to get the Debtor's  
16 consent before doing this?

17 "A No."

18 A Yes, I gave that testimony.

19 Q Okay. And you also had the phone number changed from the  
20 Debtor's account to your own personal account; is that right?

21 A The phone number changed? The phone number stayed the  
22 same.

23 Q But you had the number changed from the Debtor's account  
24 to your own personal account, correct?

25 A The Debtor said they wouldn't pay for it anymore. Who

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1 else could I change it to?

2 MR. MORRIS: Your Honor, I move to strike. It's a  
3 very simple question.

4 THE COURT: Sustained.

5 BY MR. MORRIS:

6 Q I'll ask it one more time, Mr. Dondero. You had the phone  
7 number changed from the Debtor's account to your personal  
8 account, correct?

9 A I didn't change the number. I had the billing changed to  
10 my personal account versus the company account.

11 Q And you never asked the Debtor for permission to do that,  
12 correct?

13 A No.

14 Q And you never told Debtor you were doing that, correct?

15 A No.

16 Q And nobody ever told Mr. Seery or anybody at my firm that  
17 the phone was being thrown in the garbage, correct?

18 A Well, --

19 MR. BONDS: To the extent he knows.

20 THE WITNESS: Yeah. I have no idea. But I didn't.

21 BY MR. MORRIS:

22 Q You didn't believe it was necessary to give the Debtor  
23 notice that you were taking the phone number for your own  
24 personal account and throwing the phone in the garbage,  
25 correct?

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1 A Correct.

2 Q The phone --

3 MR. BONDS: Your Honor, I'm going to object. He --  
4 Mr. Dondero did not testify he personally threw the phone in  
5 the garbage.

6 MR. MORRIS: Withdrawn.

7 THE COURT: Okay.

8 BY MR. MORRIS:

9 Q Mr. Dondero, the phone was in Highland's offices on  
10 December 10th, the date the TRO was in effect, correct?

11 A I -- I don't -- I -- I -- I don't know. You know, I don't  
12 know. It's -- I remember going over to -- well, anyway, I --  
13 I don't know. We'll leave it at that.

14 MR. MORRIS: Can we go to Exhibit G, please?

15 BY MR. MORRIS:

16 Q Who's Jason Rothstein, while we wait?

17 A Jason, Jason is our -- is the Highland head of technology.

18 Q Okay. And did you text with him from time to time? On or  
19 about December 10th?

20 A Yes.

21 Q Okay.

22 MR. MORRIS: Can we just scroll up a little bit?

23 BY MR. MORRIS:

24 Q Is that Mr. Rothstein there?

25 A Yes. Yeah.

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1 Q Okay. And do you see that there's a text message that you  
2 sent to him on December 10th, right at the top? Can you read  
3 -- can you read the text message Mr. Rothstein --

4 A He sent that to me. At the top.

5 Q I apologize. Thank you for the correction. Can you read  
6 what Mr. Rothstein told you on December 10th?

7 A That my old phone is in the top drawer of Tara's desk.

8 Q And who's Tara?

9 A My assistant.

10 Q Is she still your assistant today?

11 A Yes.

12 Q And has she been serving as your assistant since the TRO  
13 was entered into on December 10th?

14 A Yes.

15 Q Okay. Is it fair to say that you were informed on  
16 December 10th that the phone was not thrown in the garbage,  
17 had not been disposed of, but was instead sitting in Tara's  
18 desk?

19 A As of that moment, yes.

20 Q Okay. And it's also fair to say that, as of December  
21 10th, Mr. Rothstein didn't take it upon himself to throw your  
22 old phone in the garbage, right?

23 A Not as of that moment. But like I said, I can find out  
24 how it was disposed of.

25 Q If you were curious to do that, would you have done that

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1 before today?

2 A I haven't been curious.

3 Q Thank you very much. Someone you can't identify made the  
4 decision after December 10th to throw the phone in the garbage  
5 without asking the Debtor for permission or seeking the  
6 Debtor's consent, correct?

7 MR. BONDS: I'm going to object, Your Honor. To the  
8 extent that the witness knows, he can answer.

9 THE COURT: I -- I didn't hear --

10 THE WITNESS: I don't know.

11 THE COURT: I didn't hear what your objection was,  
12 Mr. Bonds. Repeat.

13 MR. BONDS: Your Honor, my objection was along the  
14 lines of to the extent that the witness knows, he could  
15 testify, but if he doesn't know, he doesn't need to speculate.

16 THE COURT: All right. Well, I don't hear an  
17 objection there, but go ahead, Mr. Dondero, if you have  
18 knowledge and can answer the question.

19 THE WITNESS: I don't know.

20 BY MR. MORRIS:

21 Q Do you recall that the Debtor subsequently gave notice to  
22 you to vacate its offices and to return its cell phone?

23 A I don't know.

24 Q Did you ever --

25 A I know I -- I know I was told to vacate the offices. I



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1 didn't see the specific --

2 Q Uh-huh. Your lawyer -- your lawyers never told that  
3 Debtor that the cell phone had been disposed of or thrown in  
4 the garbage, consistent with company practice, right?

5 A I don't know.

6 MR. MORRIS: Can we put up Exhibit K, please?

7 BY MR. MORRIS:

8 Q This is the letter that my firm sent to your lawyer on  
9 December 23rd. Do you see that?

10 A Yeah, I see it.

11 Q Okay.

12 MR. MORRIS: Can we scroll down a little bit? Keep  
13 going. Okay. Stop right there.

14 BY MR. MORRIS:

15 Q Do you see that it says that, as a result of the conduct  
16 described above, that the Debtor "has concluded that Mr.  
17 Dondero's presence at the HCMLP office suite and his access to  
18 all telephonic and information services provided by HCMLP are  
19 too disruptive"?

20 A Yeah, I see it.

21 Q And this is the letter that gave you notice that you had  
22 to vacate the premises by December 30th, correct?

23 A I believe so.

24 MR. MORRIS: Can we scroll down a little bit?

25 BY MR. MORRIS:

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1 Q You see at the bottom there's a reference to a defined  
2 term of "cell phones"?

3 A Yes.

4 Q And it says that the Debtor "will also terminate Mr.  
5 Dondero's cell phone plan and those cell phone plans  
6 associated with parties providing personal services to Mr.  
7 Dondero." Do you see that?

8 A Yes. Yeah.

9 Q Have I read that accurately?

10 A Yes.

11 Q And then my colleagues went on to write, "HCMLP demands  
12 that Mr. Dondero immediately turn over the cell phones to  
13 HCMLP by delivering them to you, Mr. Lynn." Do you see that?

14 A Yes.

15 Q Have I read that accurately?

16 A Yes.

17 Q The last sentence on the page begins, "The cell phones  
18 and."

19 MR. MORRIS: And let's scroll down further.

20 BY MR. MORRIS:

21 Q "The cell phones and the accounts are property of HCMLP.  
22 HCMLP further demands that Mr. Dondero refrain from deleting  
23 or wiping any information or messages on the cell phone.  
24 HCMLP, as the owner of the account and cell phones, intends to  
25 recover all information related to the cell phones and

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1 accounts, and reserves the right to use the business-related  
2 information." Have I read that accurately?

3 A Yes.

4 Q Okay. We were a couple of weeks too late, huh?

5 A It sounds like it.

6 Q Yeah. Because the phones were already in the garbage,  
7 right?

8 A Yes.

9 Q Uh-huh. But that's not what Mr. Lynn told the Debtor on  
10 your behalf, right?

11 A I don't know.

12 Q Mr. Lynn -- all right. Let's -- let's see what Mr. Lynn  
13 said.

14 MR. MORRIS: Can we go to Exhibit U, please?

15 BY MR. MORRIS:

16 Q It took Mr. Lynn six days to write a one-paragraph letter  
17 in response, right? December 29th, he responded?

18 MR. MORRIS: Can we scroll down a bit?

19 BY MR. MORRIS:

20 Q Let me read beginning with the second sentence of the  
21 first substantive paragraph. "We are at present not sure of  
22 the location of the cell phone issued to Mr. Dondero by the  
23 Debtor, but we are not prepared to turn it over without  
24 ensuring the privacy of the attorney-client communications."  
25 And then he goes on.

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1 Have I read that correctly?

2 A Yes.

3 Q Okay. So Mr. Lynn didn't say anything about the phone  
4 being thrown in the garbage, right?

5 A No.

6 Q He didn't say that it was disposed of, did he?

7 A No.

8 Q He didn't refer to any company practice or policy, right?

9 A No.

10 Q Mr. Lynn's not a liar, is he?

11 A No, he's not.

12 Q He's a decent and honest professional. Wouldn't you agree  
13 with that?

14 A Yes.

15 Q And is it fair to say that he conveyed only the  
16 information that he had at the time?

17 A I don't know.

18 Q Do you have any reason to believe that Mr. Lynn would  
19 withhold from the Debtor the information that the cell phone  
20 had been thrown in the garbage, consistent with company  
21 practice?

22 A No, I don't believe he would withhold whatever he knew.

23 Q All right. Let's talk about -- let's talk about other  
24 matters. You do know, sir, do you not, that the Debtor is  
25 subject to the Bankruptcy Court's jurisdiction?

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1 A Yes.

2 Q Okay. And we just saw in the December 23rd letter that  
3 the Debtor demanded that you vacate their offices a week  
4 later, right?

5 A Yes.

6 Q And you knew that at or around the time the letter was  
7 sent on December 23rd, correct?

8 A I -- I don't remember when I knew.

9 Q Well, in fact, in fact, you or through counsel asked for  
10 an accommodation and asked for an extension of time to  
11 December 31st; isn't that right?

12 A I had to pack up 30 years of stuff in three days. I -- I  
13 know we asked for some forbearance. I don't think we got any.  
14 I don't remember the details. I don't understand why it's  
15 important.

16 Q Okay. It was actually -- withdrawn. The Debtor actually  
17 gave you seven days' notice, right? They sent the letter on  
18 December 23rd and asked you to vacate on December 30th,  
19 correct?

20 A I don't -- I don't remember. But, again, I think the  
21 initial response was it was inconsistent with shared services  
22 agreement. No Highland employees are coming into the office  
23 anyway. So kicking me out of my office was -- seemed  
24 vindictive and overreaching. And we tried to get some, you  
25 know, forbearance.

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1 Q Okay.

2 MR. MORRIS: I move to strike, Your Honor.

3 THE COURT: Sustained.

4 BY MR. MORRIS:

5 Q Mr. Dondero, you were given seven days' notice before --  
6 before you were going to be barred from the Debtor's office,  
7 correct?

8 A I don't know.

9 Q Okay.

10 MR. MORRIS: Can we go back to Exhibit K, please?

11 Oh, actually, it's okay.

12 BY MR. MORRIS:

13 Q We just read, actually, the piece from the Debtor's letter  
14 of December 23rd barring you from the Debtor's office. Do you  
15 remember that? And we can go back and look at it if you want.

16 A Yes.

17 Q Was there anything ambiguous that you recall about the  
18 Debtor's demand that you not enter their offices after  
19 December 30th?

20 A Ambiguous? I can tell you what my understanding was or I  
21 can tell you what the letter says. What would you like to  
22 know?

23 Q I'd just like to know if, as you sit here right now, you  
24 believe there was anything ambiguous about the Debtor's demand  
25 that you vacate the offices as of December 30th?

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1 A I mean, I did vacate the offices as of December 30th.

2 Q Correct. And you knew that -- and you were complying with  
3 the Debtor's demand you do that, right?

4 A Well, with the Court's demand, I guess.

5 Q Okay. And it's your understanding that you would not be  
6 permitted in the Debtor's offices after that time, correct?

7 A Um, (pause), uh, I don't know how to answer that question.  
8 I knew I wouldn't be residing in the offices anymore. But for  
9 legitimate business purposes, to visit the people at NexPoint  
10 who were in the office, since there are no Highland people in  
11 the office, or to handle a deposition, you know, there was  
12 nothing I thought inappropriate about that.

13 Q Did the Debtor tell you that they would allow you to enter  
14 the offices any time you just believed that it would be  
15 appropriate to do that?

16 A I used my business judgment.

17 MR. MORRIS: I move to strike.

18 BY MR. MORRIS:

19 Q I'm asking you a very --

20 THE COURT: Sustained.

21 BY MR. MORRIS:

22 Q -- specific question, sir. Did the Debtor ever tell you  
23 that they -- that you would be permitted to enter their  
24 offices after December 30th if you, in your own personal  
25 discretion, believed it to be appropriate?

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1 A No.

2 Q Did the Debtor provide you any exception to their demand  
3 that you vacate the offices, without access, by and after  
4 December 30th?

5 A I always do what I think is appropriate and in the best  
6 interests. I don't know. I didn't know the specifics of the  
7 Debtor's -- okay, yeah, what the specifics of the Debtor was.

8 Q Despite the unambiguous nature of the Debtor's demands  
9 letter, on Tuesday you just walked right into the Debtor's  
10 office and sat for the deposition, correct?

11 A I believe that was reasonable, yes.

12 Q Okay. But you didn't -- you didn't have the Debtor's  
13 approval to do that, correct?

14 A We didn't have technology to do it anywhere else, so if  
15 the deposition was going to occur, it had to occur there.

16 Q Sir, --

17 MR. MORRIS: Move to strike.

18 THE COURT: Sustained.

19 BY MR. MORRIS:

20 Q And I ask you to just listen very carefully. And if it's  
21 not clear to you, please let me know. You did not have the  
22 Debtor's approval to enter their offices on Tuesday to give  
23 your deposition, correct?

24 A No.

25 Q And you did not even bother to ask the Debtor for



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1 permission, correct?

2 A I'm prohibited from contacting them, so no, I did not.

3 Q Okay. Let's talk about other events that occurred after

4 the entry of the TRO. We talked earlier about how you

5 interfered with Mr. Seery's trading activities on behalf of

6 the CLOs around Thanksgiving. Do you remember that?

7 A Yes.

8 Q But after the TRO was entered, the K&L Gates Clients also

9 interfered with the Debtor's trading activities, correct?

10 A No.

11 MR. MORRIS: Can we go to Exhibit K, please? Can we  
12 start at the first page? And scroll down just a bit.

13 BY MR. MORRIS:

14 Q Do you see there's an explanation there about the Debtor's  
15 management of CLOs?

16 A Yes.

17 Q And there's a recitation of the history that we talked  
18 about earlier, where around Thanksgiving you intervened to  
19 block those trades?

20 A Yes.

21 Q And then the next paragraph refers to the prior motion  
22 that was brought by the CLO entities? I mean, the K&L Gates  
23 entities, right?

24 A Yes.

25 Q And you were aware of that motion at the time it was made,

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1 right?

2 A Yes.

3 Q And you were supportive of the making of that motion,  
4 right?

5 A Supportive? Yes.

6 MR. MORRIS: And scroll down to the next paragraph,  
7 please.

8 BY MR. MORRIS:

9 Q Okay. So, my colleague wrote that, "On December 22nd,  
10 2020, employees of NPA and HCMFA notified the Debtor that they  
11 would not settle the CLO sale of the AVAYA and SKY  
12 securities." Have I read that right?

13 A Yes.

14 Q And that took place six days after the motion that the  
15 Court characterized as frivolous was denied on December 16th?

16 A Yes. I wasn't aware of that, for what that's worth.

17 Q Okay. You personally instructed the employees --  
18 withdrawn. NPA -- that refers to NexPoint, correct?

19 A Yes.

20 Q That's an entity you own and control, right?

21 A I -- largely.

22 Q And that's one of the Advisors we defined earlier, right?

23 A Yes.

24 Q And HCMFA, that's Fund Advisors, another advisory firm  
25 that you own and control, correct?

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1 A Yes.

2 Q And you personally instructed, on or about December 22nd,  
3 2020, employees of those Advisors to stop doing the trades  
4 that Mr. Seery had authorized with respect SKY and AVAYA,  
5 right?

6 A Yeah. Maybe we're splitting hairs here, but I instructed  
7 them not to trade them. I never gave instructions not to  
8 settle trades that occurred. But that's a different ball of  
9 wax.

10 Q Okay. But you did instruct them not to execute trades  
11 that had not been made yet, right?

12 A Yeah. Trades that I thought were inappropriate, for no  
13 business purpose, I -- I told them not to execute.

14 Q Okay. You actually learned that Mr. Seery wanted to  
15 effectuate these trades the Friday before, right?

16 A I don't know, but what did I do? When did I know it?  
17 What did I do? When I knew things are inappropriate, I  
18 reacted immediately. I don't -- I don't -- whenever --  
19 whenever I found out about inappropriate things, I reacted to  
20 the best of my ability.

21 Q Okay.

22 MR. MORRIS: I move to strike, Your Honor.

23 THE COURT: Sustained.

24 Mr. Dondero, I'm going to -- I'm going to interject some  
25 instructions once again here. Remember we talked about early

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1 on, and I know you've testified before, but I'll repeat it:

2 You need to just give direct yes or no answers.

3 And let me just say that we see witnesses all the time do  
4 what you're doing here, and that is they feel they need to say  
5 more than yes or no. They feel the need to clarify or  
6 supplement the yes or no answer they give. And just to remind  
7 you how this works, your lawyer, Mr. Bonds, is going to be  
8 given the opportunity when Mr. Morris is through to ask you  
9 all the questions he wants, and that will be your chance to  
10 clarify yes and no answers to the extent he asks you to  
11 revisit certain of these questions and answers. Okay?

12 So I'm going to remind you once again: yes or no or  
13 direct -- you know, other appropriate direct answers. Mr.  
14 Bonds can let you clarify later. All right?

15 Mr. Morris, continue.

16 MR. MORRIS: Okay. Thank you, Your Honor.

17 Can we please put up on the screen Exhibit L? And at the,  
18 I guess, the bottom of Page 1.

19 BY MR. MORRIS:

20 Q This is an email string. And --

21 MR. MORRIS: Go to the email below that, please.

22 Yeah. Okay. Right there.

23 BY MR. MORRIS:

24 Q This is an email from Mr. Seery dated December 18th at  
25 (garbled) :30 p.m. Do you see that?

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1 A Yes.

2 Q And in the substantive portion of his email, continuing on  
3 to the next page, he's giving instructions to sell certain SKY  
4 and AVAYA securities that are held by CLOs, correct?

5 A Yes.

6 Q And Mr. Sowin forwarded this email to you, right?

7 A Yes.

8 MR. MORRIS: If we can scroll up.

9 BY MR. MORRIS:

10 Q And you forwarded it to Mr. Ellington, right? I'm sorry.  
11 Let's just give Ms. Canty a chance.

12 MR. MORRIS: Keep scrolling up.

13 BY MR. MORRIS:

14 Q So, Mr. Sowin forwarded it to you at 3:34 p.m. Do you see  
15 that?

16 A Yes.

17 Q And if we scroll up, you turn around and give it to Mr.  
18 Ellington a few minutes later, right?

19 A Yes.

20 Q So that you and Mr. Ellington and Mr. Sowin are all aware  
21 that Mr. Seery wants to sell AVAYA and SKY securities on  
22 behalf of the CLOs, right?

23 A Yes.

24 Q Why did you decide to forward this email to Mr. Ellington?

25 A Ellington's role has been of settlement counsel that

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1 supposedly everybody is able to talk to to try and bridge some  
2 kind of settlement. Ellington, I thought, should be aware of  
3 things that would make settlement more difficult or create  
4 liabilities for the Debtor. And so I thought it was  
5 appropriate for him to know.

6 Q Okay. This is the email that caused you to put a stop to  
7 the trades that Mr. Seery wanted to effectuate, correct?

8 A This is the -- I'm sorry. Ask the question again. This  
9 is the email that what?

10 Q This is -- this is how you learned that Mr. Seery wanted  
11 to effectuate trades in AVAYA and SKY securities, right?

12 A I -- I learned about it pretty early on of him trading it.  
13 I don't know if it was this email or -- or one of the others.  
14 But yes, it was from -- it was from Joe Sowin.

15 Q And you would agree with me, would you not, that you  
16 personally instructed the employees of the Advisors not to  
17 execute the very trades that Mr. Seery identifies in this  
18 email, correct?

19 A Yes.

20 Q At no time after December 10th, when the TRO was entered  
21 into, did you instruct the employees of the Funds that you own  
22 and control not to interfere or impede the Debtor's management  
23 of the CLOs, correct?

24 MR. BONDS: Can you repeat the question? I'm sorry.

25 BY MR. MORRIS:

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1 Q At no time after December 10th, when the TRO was entered,  
2 did Mr. Dondero instruct any employee of either of the  
3 Advisors that he owns and controls not to interfere or impede  
4 with the Debtor's business and management of the CLOs,  
5 correct?

6 A I did not.

7 Q Okay. Neither you nor anybody that you know of ever  
8 provided a copy of the TRO to the employees of the Advisors  
9 that you own and control, correct?

10 A I don't know.

11 Q Okay. After the TRO was entered, the K -- after the TRO  
12 was entered, and after the hearing on December 16th, the K&L  
13 Gates Clients sent three more letters to the Debtor, right?

14 A Yes.

15 Q Okay.

16 MR. MORRIS: Your Honor, those are Exhibits M as in  
17 Mary, N as in Nancy, and X as in x-ray.

18 THE COURT: Okay.

19 MR. MORRIS: Unless the witness thinks there is a  
20 need to look at them specifically -- oh, let me just ask a  
21 couple of questions.

22 BY MR. MORRIS:

23 Q Mr. Dondero, in those letters, it's your understanding  
24 that the K&L Gates Clients again requested that the Debtor not  
25 trade any securities on behalf of the CLOs, right?

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1 A Yes.

2 Q And it's your understanding that in those letters the K&L  
3 Gates Clients suggested that they might seek to terminate the  
4 CLO management agreements to which the Debtor was a party,  
5 correct?

6 A I don't know specifically, but that wouldn't surprise me.

7 Q Okay.

8 A So, --

9 Q Is it your understanding that the K&L Gates Clients also  
10 sent the letter a Debtor -- the Debtor a letter in which they  
11 asserted that your eviction from the offices might cause them  
12 damages and harm?

13 A I know there was objections to me -- I assume so. I don't  
14 know specifically.

15 Q And you were aware of these letters at the time that they  
16 were being sent, right?

17 A I'm sorry, what?

18 Q You were aware of these letters at the time they were  
19 being sent by the K&L Gates Clients, right?

20 A Generally, yes.

21 Q And you were generally supportive of the sending of those  
22 letters, right?

23 A I'm always supportive of doing what we believe is the  
24 right thing, yes.

25 Q And in this case, you were supportive of the sending of



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1 these three letters, correct?

2 A I -- yes.

3 Q In fact, you pushed and encouraged the chief compliance  
4 officer and the general counsel to send these letters, right?

5 A I push them to do the right thing. I didn't push them  
6 specifically.

7 Q Okay. At the time the letters were sent, you were aware  
8 that the K&L Gates Clients had filed that motion that was  
9 heard on the 16th of December, correct?

10 A Yes.

11 Q And you were aware that they advanced the very same --  
12 withdrawn. You're aware that in the letters they advance some  
13 of the very same arguments that Judge Jernigan had dismissed  
14 as frivolous just six days earlier, right?

15 A I wasn't at the hearing. I don't know if it was the same  
16 arguments or similar arguments. I -- I can't -- I can't  
17 corroborate the similarity or contrast the differences between  
18 the two.

19 Q All right. So it's fair to say, then, that you were  
20 supportive of the sending of these letters, you were aware of  
21 the December 16 argument, but you didn't take the time to see  
22 whether or not any of the arguments being advanced in the  
23 letters were consistent or any different from the arguments  
24 that were made at the December 16th hearing, correct?

25 A Correct. I wasn't directly involved, but still believed

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1 that fundamentally Seery's behavior was wrong.

2 Q You never instructed the K&L Gates Clients to withdraw the  
3 three letters that were sent after December 10th, correct?

4 A No.

5 Q And you're aware that the Debtor had demanded that those  
6 letters be withdrawn or it would seek a temporary restraining  
7 order against the K&L Gates Clients, correct?

8 A I'm not aware of the back and forth.

9 Q Okay. Let's talk about your communications with Mr.  
10 Ellington and Mr. Leventon. You communicated with them on  
11 numerous occasions after December 16th, correct?

12 A No.

13 Q No, you didn't communicate with them many times after  
14 December 10th?

15 A You're lumping in Ellington and Isaac, and numerous times  
16 is a bad clarifier, so the answer is no.

17 Q I appreciate that. You communicated many times with Mr.  
18 Ellington after December 10th, right?

19 A Not -- not outside shared services, pot plan, and him  
20 being the go-between between me and Seery. I would say  
21 virtually none.

22 Q Okay. On Saturday, December 12th, two days after the  
23 temporary restraining order was entered against you, Mr.  
24 Ellington was involved in discussions with your personal  
25 counsel about who would serve as a witness at the upcoming

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1 December 16th hearing, correct?

2 A I don't -- I don't remember.

3 Q Let's see if we can refresh your recollection.

4 MR. MORRIS: Can we please put up Exhibit P? Can we  
5 scroll down? Okay.

6 BY MR. MORRIS:

7 Q Do you see where Mr. Lynn writes you an email on Saturday,  
8 December 12th, and he says, among other things, it looks like  
9 trial?

10 A Yes.

11 Q And then if we scroll up a little bit, he wrote further,  
12 "That said, we must have a witness now." Have I read that  
13 accurately?

14 A Yes.

15 Q Okay.

16 MR. MORRIS: Can we scroll back up?

17 BY MR. MORRIS:

18 Q And this is Mr. Ellington's response, right?

19 A Yes.

20 Q Can you read Mr. Ellington's response for Judge Jernigan?

21 A (reading) It will be J.P. Sevilla. I'll tell him that he  
22 needs to contact you first thing in the morning.

23 Q Is it your testimony that this email relates to --  
24 withdrawn. Mr. Ellington is not your personal lawyer, right?

25 A No. Mr. Ellington has been functioning as settlement

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1 counsel, trying to bridge settlement, --

2 Q Okay.

3 A -- which is what this email looks like to me.

4 Q Okay. I'll let -- I'll let the judge --

5 MR. MORRIS: I move to strike, Your Honor.

6 THE COURT: Sustained.

7 BY MR. MORRIS:

8 Q So, after the TRO was entered, you and Mr. Ellington not  
9 only communicated but Mr. Ellington was actively involved in  
10 identifying witnesses to testify on behalf of your interests  
11 at the December 16th hearing, correct?

12 A I -- I don't know what the witness was for, but I believe  
13 Ellington was doing his job as settlement counsel, trying to  
14 facilitate settlement. I don't -- I have no reason to think  
15 this was anything more nefarious.

16 Q Okay. You looked to Mr. Ellington for leadership in  
17 coordinating with all of the lawyers who were working for you  
18 and your personal interests, right?

19 A I'm not agreeing with that.

20 Q No? All right.

21 MR. MORRIS: Let's look at the next exhibit. I think  
22 it's Exhibit Q. And if we could stop right there.

23 BY MR. MORRIS:

24 Q There's an email from Douglas Draper, do you see that, on  
25 December 16th?

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1 A Yes.

2 Q So this is after the TRO was entered into, right?

3 A I believe so.

4 Q And Mr. Draper represents Get Good and Dugaboy; is that  
5 right?

6 A I believe so.

7 Q And he was new to the case at that moment in time, right?

8 A On or about, I believe so.

9 Q And he was looking to -- he was looking for a joint  
10 meeting among all of the lawyers representing your personal  
11 interests, right?

12 A No. I think he was trying to coordinate -- coordinate or  
13 understand whatever. But not everybody -- he doesn't just  
14 talk to lawyers around my interests. I mean, and he hasn't  
15 sought agreements with just lawyers reflecting my interests.

16 Q You forwarded Mr. Draper's email to Mr. Ellington, right?

17 A Yes.

18 Q But you can't remember why you did that, right, or at  
19 least -- withdrawn. You couldn't remember as of Tuesday's  
20 deposition why you forwarded this email to Mr. Ellington,  
21 right?

22 A Not specifically. But, again, Ellington is settlement  
23 counsel.

24 MR. MORRIS: I move to strike, Your Honor, after the  
25 initial phrase "Not specifically."

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1 THE COURT: Sustained.

2 MR. MORRIS: Can we scroll up a little bit, please?

3 BY MR. MORRIS:

4 Q Mr. Lynn responded initially with a reference to the  
5 assumption that a particular lawyer was with K&L Gates, right?

6 A Yes.

7 MR. MORRIS: And if we could scroll up a little bit.

8 BY MR. MORRIS:

9 Q That's where you forward this email to Mr. Ellington,  
10 right?

11 A Yes.

12 Q And can you read to Judge Jernigan what you wrote at 1:33  
13 p.m.?

14 A (reading) I'm going to need you to provide leadership  
15 here.

16 Q But at least as of Tuesday's deposition, you couldn't  
17 remember why you needed Mr. Ellington to provide leadership,  
18 right?

19 A Correct. Nor if he did.

20 MR. MORRIS: I move to strike the latter portion of  
21 the answer, Your Honor.

22 THE COURT: Sustained.

23 BY MR. MORRIS:

24 Q So you have no --

25 (Echoing.)

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1 MR. MORRIS: We're getting --

2 THE WITNESS: Can I -- can I hold -- can I hold on  
3 for one second here? Can I just put you guys on mute, please?

4 MR. MORRIS: Sure.

5 (Pause.)

6 THE COURT: All right.

7 THE CLERK: John, there's some feedback again. I'm  
8 sorry.

9 MR. MORRIS: That's okay.

10 THE COURT: Mr. Bonds, --

11 MR. MORRIS: We lost Mr. --

12 THE COURT: Mr. Bonds, what's going on?

13 MR. MORRIS: We've lost -- the screen --

14 THE COURT: You know you can't counsel your client in  
15 the middle of court testimony. I thought maybe Mr. Dondero  
16 had some non-legal thing going on in the background. Mr.  
17 Bonds?

18 MR. BONDS: Your Honor, I -- I did not in any way  
19 counsel Mr. Dondero.

20 THE COURT: Okay. Well, I'll take your  
21 representation on that. Are we ready to go forward?

22 MR. MORRIS: I'll readily accept Mr. Bonds'  
23 representation as well, Your Honor.

24 THE COURT: Okay.

25 MR. MORRIS: But I'd ask that it not happen again.

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1 THE COURT: Well, fair enough. I think Mr. Bonds  
2 understands.

3 BY MR. MORRIS:

4 Q Mr. Dondero, you have no recollection of why you forwarded  
5 this email to Mr. Ellington and why you told him you needed  
6 him to provide leadership, correct?

7 A Correct.

8 MR. MORRIS: And if we can scroll up, can we just see  
9 how Mr. Ellington responded?

10 BY MR. MORRIS:

11 Q All right. And can you just read for Judge Jernigan what  
12 Mr. Ellington said on December 16th in response to your  
13 statement that you're going to need him to provide leadership  
14 here?

15 A (reading) On it.

16 Q Thank you. In your deposition, you testified without  
17 qualification that Scott Ellington and Isaac Leventon did not  
18 participate in the drafting of a joint interest or mutual  
19 defense agreement. Do you recall that testimony?

20 A Yes, as far as I knew.

21 Q And you also testified that you never discussed with  
22 either of them the topic of a joint defense or mutual defense  
23 agreement; is that right?

24 A Correct. That was Draper.

25 Q Okay.



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1 MR. MORRIS: Can we put up Exhibit 11, please? I  
2 apologize. It's Exhibit W. Okay. Can we stop right there?

3 BY MR. MORRIS:

4 Q This is an email between some of your counsel and Mr.  
5 Ellington. Do you see that?

6 A Yes.

7 Q And a common interest agreement is attached to the  
8 communication. Is that a fair reading of the portion of the  
9 exhibit that's on the screen?

10 A Yes.

11 MR. MORRIS: And can we scroll to the top of the  
12 exhibit, please?

13 BY MR. MORRIS:

14 Q And do you see that there is an email exchange between Mr.  
15 Ellington and Mr. Leventon concerning the common interest  
16 agreement?

17 A Yes.

18 Q Okay. So it's your testimony that this email may exist  
19 but you had no idea that Mr. Ellington and Mr. Leventon were  
20 working with your lawyers to draft a common interest  
21 agreement? Is that your testimony?

22 A I wasn't part of this. It looks to me like they were just  
23 included in a -- a final draft. And, again, Ellington is  
24 settlement counsel. I -- but I don't want to speculate why or  
25 what they were doing.

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1 Q Do you remember that I asked you a few questions the other  
2 day about Multi-Strat financial statements and whether or not  
3 you'd ever given -- you'd ever received any of those documents  
4 from Mr. Ellington and Mr. Leventon?

5 A Yes.

6 Q Okay. And you testified under oath that you never got any  
7 financial information, including balance sheets, concerning  
8 Multi-Strat from either of those lawyers, correct?

9 A I -- hmm. I -- I don't remember. Yeah, I don't remember.  
10 I may have to clarify that, but I don't remember.

11 Q You testified under oath the other day that you wouldn't  
12 even think to ask them for financial information relating to  
13 Multi-Strat because it's not natural for them to have it,  
14 right?

15 A I -- I'm sorry.

16 THE WITNESS: Your Honor, do I just have to answer  
17 these questions yes or no, or is that the -- can I clarify at  
18 all, or can I --

19 THE COURT: Well, I mean, if the question simply  
20 directs a yes or no answer, that's correct, you just answer  
21 yes or no. And I think this one did.

22 Again, your lawyer is going to have the chance to do  
23 follow-up examination later.

24 BY MR. MORRIS:

25 Q So let me try again. During your deposition, you

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1 testified under oath without qualification that you never got  
2 any financial information, including balance sheets,  
3 concerning Multi-Strat from Scott Ellington or Isaac Leventon,  
4 correct?

5 A I believe I might have misspoken there.

6 Q Okay. But that was your testimony the other day, right?

7 A Yes.

8 Q And today, you believe you might have gotten that  
9 information from them, right?

10 A Only because Ellington was supposed to be the go-between  
11 and I couldn't go directly to somebody. But he wouldn't  
12 normally have that information, which is what I was saying.

13 MR. MORRIS: Your Honor, I have an exhibit that's not  
14 on the Debtor's exhibit list, and I was going to use it for  
15 impeachment purposes to establish the fact that Mr. Ellington  
16 and Mr. Leventon in fact gave to Mr. Dondero, after December  
17 10th, financial information concerning Multi-Strat, which Mr.  
18 Dondero had previously denied receiving. May I -- may I use  
19 that document to impeach Mr. Dondero?

20 THE COURT: You may.

21 MR. BONDS: Your Honor, I'm going to object. This is  
22 pretty clearly something that should have been disclosed and  
23 it wasn't.

24 THE COURT: Well, he says it's purely to impeach the  
25 testimony that Mr. Dondero just now gave. So we'll -- we'll

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1 see the document and, you know, I'll either agree with that  
2 being impeachment or not. So, he may proceed.

3 MR. BONDS: Your Honor, I think that the testimony  
4 -- Your Honor, I'm sorry. I think that the testimony that was  
5 (inaudible) given was that he thought that he may have talked  
6 to Scott or Isaac, not that he did not.

7 MR. MORRIS: Your Honor, if I may, the testimony the  
8 other day was unequivocal and unambiguous that not only didn't  
9 he get this information from the two lawyers, but that he had  
10 no reason to believe he would ever get the information from  
11 those two lawyers.

12 I appreciate the fact that Mr. Dondero today is suggesting  
13 that he may have, but I -- I would still like to use this  
14 document to refresh his recollection and to impeach even the  
15 possibility that he's giving this qualified testimony that he  
16 may have.

17 THE COURT: All right.

18 MR. MORRIS: There's no doubt that he did.

19 THE COURT: I overrule the objection. You can go  
20 forward.

21 MR. MORRIS: Can we please put up on the screen -- I  
22 believe it's Debtor's Exhibit AA. And if we can scroll down,  
23 please. And just stop, yeah, towards the top. All right.  
24 Stop right there.

25 BY MR. MORRIS:

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1 Q Do you see in the first email Mr. Klos -- he's an employee  
2 of the Debtor, right?

3 A Yes.

4 Q And he provides Multi-Strat balance sheet and financial  
5 information to Mr. Leventon, Mr. Ellington, and Mr.

6 Waterhouse. Do you see that?

7 A Yes. He's the person I would normally go to.

8 Q Okay. And they're all Debtor employees, right?

9 A Yes.

10 Q Okay. And then Mr. Leventon sends it to you and Mr.  
11 Ellington on February 4th, 2020; is that correct?

12 A Yes.

13 Q And this is confidential information; is that fair?

14 A No.

15 Q Okay. Let's -- let's talk about the next --

16 A No, it's not -- wait, wait, hold on a second. Judge, I  
17 need to clarify this. I -- it's not confidential information.  
18 It's available to every investor, of which I was one of them.

19 Okay? So, let's -- let's not mischaracterize this as some  
20 corporate secret.

21 Q Okay. You interfered with the Debtor's production of  
22 documents; isn't that right?

23 A No.

24 Q Several times in the last year, various entities have  
25 requested that Dugaboy produce its financial statements,

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1 correct?

2 A Dugaboy is my personal trust. It's not an entity of the  
3 Debtor in any form or fashion.

4 Q Sir, you're aware that several times in the last year  
5 various entities requested that the Debtor produce Dugaboy  
6 financial information, correct?

7 A The Debtor is not in a position to do it. I -- I don't  
8 know if it's been several times or whatever, but it's not  
9 appropriate.

10 MR. MORRIS: I move to strike, Your Honor.

11 THE COURT: Sustained.

12 BY MR. MORRIS:

13 Q I'll try one more time. If we need to go to the  
14 transcript, we can. It's a very simple question. You knew  
15 and you know that several times in the last year various  
16 entities have requested that the Debtor produce Dugaboy  
17 financial statements, correct?

18 A Yes.

19 Q Do you recall at the deposition the other day I asked you  
20 whether you had ever discussed with Mr. Ellington and Mr.  
21 Leventon whether or not the Dugaboy financial statements  
22 needed to be produced, and you were directed not to answer the  
23 question by counsel and you followed those directions?

24 A Yes.

25 Q But you communicated with at least one employee concerning

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1 the production of the Dugaboy financial statements, correct?

2 A Yes.

3 Q And that's Melissa Schroth; is that right?

4 A Yes.

5 Q She's an executive accountant employed by the Debtor,  
6 right?

7 A Yes.

8 Q And on December 16th, after the TRO was entered into, you  
9 instructed Ms. Schroth not to produce the Dugaboy financials  
10 without a subpoena, correct?

11 A That was the advice I had gotten from counsel, yes.

12 Q Okay. The Dugaboy and Get Good financial statements are  
13 on the Debtor's platform, correct?

14 A I do not know.

15 Q There is no shared services agreement between Dugaboy or  
16 Get Good and the Debtor, correct?

17 A I don't know.

18 Q You're not aware of any; is that fair?

19 A Yes.

20 Q Okay.

21 MR. MORRIS: Can we put on the screen Exhibit R? And  
22 can you scroll down a bit?

23 BY MR. MORRIS:

24 Q Okay. That's Melissa Schroth at the top there; is that  
25 right?

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1 A Yes.

2 Q And these are texts that you exchanged with her after the  
3 TRO was entered into, correct?

4 A Yes.

5 MR. MORRIS: Can we scroll down a little bit?

6 BY MR. MORRIS:

7 Q And do you see on December 16th you sent Ms. Schroth an  
8 email -- I apologize -- a text that says, "No Dugaboy details  
9 without subpoena"?

10 A Yeah.

11 Q But you can't remember why you sent this text, correct?  
12 At least you couldn't as of Tuesday?

13 A I believe it was on advice of counsel.

14 Q But that's not what you said on Tuesday, correct?

15 A I don't remember.

16 Q You sent this text even though you knew that various  
17 entities had requested the Dugaboy financials, but you have no  
18 recollection of ever talking to anyone at any time about the  
19 production of those documents, right?

20 A Can you repeat the question?

21 Q I'll move on. Let me just -- last topic, and then I'm  
22 going to respectfully request that we just take a short break.  
23 You're familiar with the law firm of Baker & McKenzie; is that  
24 right?

25 (Echoing.)



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1 A I'm sorry. You broke up on us there.

2 Q No problem. You're familiar with the law firm Baker &  
3 McKenzie, correct?

4 A Yes.

5 Q That firm has never -- never represented you or any entity  
6 in which you have an ownership interest, correct?

7 A Correct.

8 Q But in December, the Employee Group, of which Mr. Leventon  
9 and Mr. Ellington was a part, was considering changing counsel  
10 from Winston & Strawn to Baker & McKenzie, right?

11 A I believe so.

12 Q And you asked -- and because of that, you specifically  
13 asked Mr. Leventon for the contact information for the lawyers  
14 at Baker & McKenzie, right?

15 A I believe so.

16 Q Okay.

17 MR. MORRIS: Can we put up Exhibit S, please?

18 BY MR. MORRIS:

19 Q And who is that email sent from? I apologize. Withdrawn.  
20 Who is that text message exchange with?

21 A Isaac Leventon.

22 Q Okay. And Mr. Leventon was an employee of the Debtor  
23 after December 10th, correct?

24 A Yes.

25 MR. MORRIS: Can we scroll down a little bit?

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1 BY MR. MORRIS:

2 Q And on December 22nd, you asked Mr. Leventon for the  
3 contact information at Baker & McKenzie, correct?

4 A Yes.

5 Q And the reason you asked Mr. Leventon for the contact  
6 information, that was in connection with the shared defense or  
7 mutual defense agreement, right?

8 A I -- I don't remember why. It might have just been for my  
9 records. I don't know.

10 Q The only reason that you could think of for asking for  
11 this information was for the shared defense or mutual defense  
12 agreement, correct?

13 A I -- no, it -- I don't know and I don't want to speculate.  
14 I don't want to -- I don't want to speculate. I -- did -- I  
15 don't think I ever got -- I don't know what your point is.

16 MR. MORRIS: May we please go back to the transcript  
17 at Page 136? At the bottom, Line 23.

18 BY MR. MORRIS:

19 Q Were you asked this question and did you give this answer?

20 "Q Do you recall asking Isaac Leventon for the  
21 contact information for the -- for the lawyers at  
22 Bakers & McKenzie?

23 "A I -- I don't -- I don't -- it might have been for  
24 part of the shared defense, mutual defense whatever  
25 agreement, but that's -- that's the only reason I would

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1 have asked for it."

2 Q Did you give that answer to my question?

3 A Yeah. I shouldn't have speculated.

4 Q Okay. But that's the answer you gave the other day; is  
5 that right?

6 A I shouldn't have speculated. That's my answer today.

7 Q And today -- withdrawn. In fact, you wanted the Baker  
8 contact information in order to help Mr. Draper coordinate the  
9 mutual defense agreement, correct?

10 A I don't want to speculate.

11 MR. MORRIS: Can we go to Page 139, please? Lines 2  
12 to 5.

13 BY MR. MORRIS:

14 Q Did you -- did you hear this question and did you give  
15 this answer on Tuesday?

16 "Q Why did you want the Baker & McKenzie contact  
17 information?

18 "A I was trying to help Draper coordinate the mutual  
19 shared defense agreement, period."

20 Q Did you give that answer to my question on Tuesday?

21 A Yes.

22 MR. MORRIS: Your Honor, I'd respectfully request a  
23 short break to see if I've got anything more.

24 THE COURT: All right. Well, I was going to ask you  
25 how much more do you think you have. We've been going almost

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1 two hours.

2 So we'll take a break. Let's make it a ten-minute break.

3 And then, depending on how much more you have and how much Mr.

4 Bonds is going to have, we'll figure out are we going to need

5 a lunch break in just a bit.

6 All right. So it's 12:00 noon Central. We'll come back

7 at 12:10. Ten minutes.

8 MR. MORRIS: Your Honor, may I have an instruction of  
9 the witness not to check his phone for any purposes, not to  
10 make -- not to communicate with anybody until -- until his  
11 testimony is completed?

12 THE COURT: All right. Any -- any --

13 MR. BONDS: Your Honor, he's going to speak with me.

14 THE COURT: Pardon?

15 MR. BONDS: I assumed he will speak to me about just  
16 general events. I mean, I don't want to be in breach of some  
17 order.

18 MR. MORRIS: Yeah. I would -- I would -- I would ask  
19 for -- you know, it's not -- he's on the stand. He's still on  
20 the stand.

21 THE COURT: Yeah. He --

22 MR. MORRIS: He shouldn't be conferring with counsel,  
23 either. No disrespect to Mr. Bonds at all.

24 THE COURT: Exactly. I mean, you all can talk about,  
25 you know, the national champion football game or whatever, but

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1 it would be counseling your client in the middle of testimony  
2 if you -- if you talk about this case at the moment. So, you  
3 know, --

4 MR. BONDS: I understand, Your Honor.

5 THE COURT: All right.

6 MR. BONDS: I just didn't want to be --

7 THE COURT: All right. So now we'll come back at  
8 12:11.

9 THE CLERK: All rise.

10 MR. MORRIS: Thank you, Your Honor.

11 (A recess ensued from 12:01 p.m. until 12:12 p.m.)

12 THE CLERK: All rise.

13 THE COURT: Please be seated. This is Judge  
14 Jernigan. We're going back on the record in Highland Capital  
15 versus Dondero. We have taken an 11-minute break. It looks  
16 like we have Mr. Dondero and counsel back. And Mr. Morris,  
17 are you out there, ready to proceed?

18 MR. MORRIS: I am, Your Honor. And I do have just a  
19 few more questions.

20 THE COURT: Okay. I'm sorry. Mr. Lynn, I see you're  
21 there in the room with Mr. Dondero. Now, did you want to --

22 MR. LYNN: Here's Mr. Bonds. I apologize. He was in  
23 the restroom.

24 THE COURT: Okay. All right. Everyone ready to  
25 proceed?

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1 MR. MORRIS: Yes, Your Honor.

2 THE COURT: Okay. Mr. Morris, go ahead.

3 MR. MORRIS: Thank you, Your Honor.

4 DIRECT EXAMINATION, RESUMED

5 BY MR. MORRIS:

6 Q Can you hear me, Mr. Dondero?

7 A Yes.

8 Q Did you ever discuss the request of any party to produce  
9 the financial statements of Get Good and Dugaboy with Scott  
10 Ellington?

11 A Not that I recall.

12 Q Did you ever communicate with Mr. Leventon on the subject  
13 matter of whether or not the financial statements for Get Good  
14 and Dugaboy needed to be produced by the Debtor?

15 A No.

16 Q Those are the two questions that you were directed not to  
17 answer the other day, right?

18 A I don't remember.

19 Q Okay. You mentioned that Mr. Ellington serves in some  
20 capacity as settlement counsel. Do I have that right?

21 A Yes.

22 Q Do you know if there's any exception in the TRO that  
23 permits you to communicate directly with Mr. Ellington in his  
24 so-called capacity as settlement counsel?

25 A There was no change in his status in the TRO. It's -- and

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1 I think he was still used by both the Debtor and by me in that  
2 function.

3 Q You said that -- you testified earlier that you understood  
4 that you were prohibited from speaking with the Debtor's  
5 employees, correct?

6 A Except for -- except for with regard to the pot plan,  
7 shared services, and Ellington as settlement counsel. But I  
8 continued to talk to employees about the pot plan as recently  
9 as the end of the year, and I continued to talk to employees  
10 about shared services based on the shared services proposal  
11 that was sent to Ellington and forwarded to me as recently as  
12 two days ago.

13 Q You never -- you never read the TRO, right?

14 A No.

15 MR. MORRIS: Can we have it put up on the screen? I  
16 don't know the exhibit number, Ms. Canty, but hopefully it's  
17 clear on the exhibit list.

18 MS. CANTY: I'm sorry, John. Can you repeat what  
19 you're looking for?

20 MR. MORRIS: The TRO. (Pause.) Can we scroll down  
21 to Paragraph 2, please? Okay.

22 BY MR. MORRIS:

23 Q I appreciate the fact that you've never seen this before,  
24 Mr. Dondero, but let me know if I'm reading Section 2(c)  
25 correctly. "James Dondero is temporarily enjoined and

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1 refrained from" -- subparagraph (c) -- "communicating with any  
2 of the Debtor's employees, except for specifically -- except  
3 as it specifically relates to shared services currently  
4 provided to affiliates owned or controlled by Mr. Dondero."

5 Have I read that correctly?

6 A Yes.

7 Q Does that provide for any exceptions concerning the pot  
8 plan?

9 A The Independent Board requested a meeting on the pot plan.

10 Q Okay. But does it -- I appreciate that, and we'll talk  
11 about that in a moment, but my question is very specifically  
12 looking at the order. And I, again, appreciate that you've  
13 never seen it before. But looking at the order now, is there  
14 any exception for you to communicate with the Debtor's  
15 employees concerning the pot plan?

16 A I would think the pot plan would fall under that, since  
17 some of the pot plan value is coming from affiliated entities  
18 that are subject to the shared services agreement. I would  
19 think that would be reasonable, again, plus the -- well, it  
20 was the subject of a meeting with the Independent Board at the  
21 end of the month.

22 Q Okay.

23 A I still think it's the best alternative for this estate.

24 Q Okay. Did you -- did you ever -- did you ever ask  
25 anybody, on your behalf, have asked the Debtors whether they



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1 agreed with what you believed was a reasonable interpretation  
2 of the restraining order?

3 A I did not.

4 Q Okay. And let's just deal with the notion of settlement  
5 counsel. Do you see anywhere in this TRO -- and if you want  
6 to read anything more, please let me know -- do you see  
7 anything in this TRO that would permit you to speak with Mr.  
8 Ellington in his so-called role as settlement counsel?

9 A Well, I would say, more importantly, I don't see anything  
10 that takes away his role as settlement counsel, which was  
11 formally done six months ago.

12 Q Okay. I did read Section 2(c) correctly, right?

13 A Yes.

14 Q And the only exception that's in Judge Jernigan's  
15 restraining order that she entered against you relates to  
16 shared services. Have I read that correctly?

17 A Yes.

18 Q Okay. Let's talk about the pot plan for a moment. After  
19 the TRO was entered, you were interested in continuing to  
20 pursue the pot plan; is that right?

21 A I still believe it's the best possible result for this  
22 estate.

23 Q And you sought a forum with the Debtor's board, correct?

24 A Yes.

25 Q And you knew that you couldn't speak directly with any

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1 member of the Debtor's board unless your counsel and the  
2 Debtor's counsel was -- was present at the same time.  
3 Correct?

4 A Yeah. As a matter of fact, I didn't go. I just had  
5 counsel go.

6 Q And the Debtor's board gave Mr. Lynn a forum for him to  
7 present your pot plan after the TRO was entered. Isn't that  
8 right?

9 A I believe so.

10 Q And are you aware that the Debtor's board spent more than  
11 an hour and a half with Mr. Lynn talking about your pot plan  
12 after the TRO was entered?

13 A Yes.

14 Q And is it fair to say that, notwithstanding Mr. Lynn's  
15 goodwill and Mr. Lynn's efforts to try to get to a successful  
16 resolution here, the terms on which the pot plan were offered  
17 were unacceptable to the Debtor?

18 A I wasn't there. I -- I don't know.

19 Q The Debtor never made a counteroffer, did it?

20 A Not that I heard.

21 Q You'll admit, will you not, that over the last year you or  
22 others acting on behalf -- on your behalf have made various  
23 pot plan proposals to the Official Committee of Unsecured  
24 Creditors?

25 A Quite generous pot plans that I think will exceed any

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1 other recoveries.

2 Q Okay. So you're aware that your pot plan was delivered  
3 either by you or on your behalf to the U.C.C., correct?

4 A I -- some were. Some, I don't know.

5 Q Okay. Has the U.C.C. ever made a counterproposal to you?

6 A Nope.

7 MR. MORRIS: I have no further questions, Your Honor.

8 THE COURT: All right. Pass the witness.

9 Mr. Bonds, do you have any time estimate for me,  
10 guesstimate?

11 MR. BONDS: My guess is, Your Honor, it'll be about  
12 an hour. I would hope that we could take some type of a  
13 break, just because I'm a diabetic and need to have some --

14 THE COURT: All right. Well, --

15 MR. MORRIS: I have no objection, Your Honor.

16 Whatever suits the Court. I'm willing to accommodate Mr.  
17 Bonds always.

18 THE COURT: Okay. Let's take a 45-minute break.  
19 Forty-five minutes. So, it's 12:22. We'll come back at seven  
20 minutes after 1:00 Central time.

21 All right. We're in recess.

22 THE CLERK: All rise.

23 (A luncheon recess ensued from 12:23 p.m. to 1:15 p.m.)

24 THE CLERK: All rise.

25 THE COURT: Please be seated. This is Judge

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1 Jernigan. We are going back on the record in Highland Capital  
2 Management versus Dondero. We took a lunch break. And when  
3 we broke, Mr. Bonds was going to have the chance to examine  
4 Mr. Dondero.

5 Let me just make sure we have, first, Mr. Dondero and Mr.  
6 Bonds. Are you there?

7 MR. BONDS: Yes, we are.

8 THE COURT: All right. Very good. I don't see your  
9 video yet, but -- there you are. All right. Mr. Morris, are  
10 you there?

11 MR. MORRIS: I am here. Can you hear me, Your Honor?

12 THE COURT: I can. All right.

13 MR. MORRIS: Thank you.

14 THE COURT: Well, we've got lots of other people, but  
15 that's all I'll make sure we have at this moment. All right.  
16 Mr. Bonds, you may proceed.

17 And, Mr. Dondero, I know you know this, but I'm required  
18 to remind you you're still under oath.

19 Okay, go ahead.

20 CROSS-EXAMINATION

21 BY MR. BONDS:

22 Q Before you resigned as portfolio manager, how long had you  
23 had with Highland Capital Management?

24 A Since inception in 1994.

25 Q Okay. And how long have your offices been at the

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1 Crescent?

2 A Eight years.

3 Q Okay. Before you resigned as portfolio manager, did you  
4 spend a lot of time in the office?

5 A Yes. I spent every business day this -- or 2020,  
6 including COVID, in the office.

7 Q Okay. And this is the first time that you are not in the  
8 office, is that right, in decades?

9 A Yes.

10 Q Can you tell us about the shared services agreement that  
11 exists between the Debtor and the other entities in which you  
12 have an interest?

13 A NexPoint, NexBank, the DAF, HFAM, primarily. I don't know  
14 what other entities paid. Shared services, which is typical  
15 in finance, for centralized tax, accounting, RICO function, so  
16 that we don't have to have redundant, multiple high-paid  
17 people in different entities. We'd have them centralized and  
18 with collective experience and collective functionality. And  
19 so, historically and recently, they pay Highland for those --  
20 fees for those services. And I, as a non-paid employee, or a  
21 non-employee of Highland but a paid employee of NexBank -- of  
22 NexPoint, was -- and my occupancy and support were part of  
23 those shared services agreement.

24 Q What do those agreements allow those entities to do?

25 A Would it allow those entities to do? Well, to access the

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1 Highland functionality as appropriate, because most of those  
2 entities, as is typical in finance, did not have their own  
3 functionality, legal, tax, and -- legal, tax, and accounting,  
4 but although they've been -- they've been building it lately  
5 in anticipation of the pot plan not going through at Highland.

6 Q Okay. Do those agreements allow you to share office space  
7 with --

8 MR. MORRIS: Objection --

9 THE WITNESS: Yes.

10 MR. MORRIS: -- to the form of the question, Your  
11 Honor. I think the exhibits and the agreements themselves  
12 would be the best evidence. They're not in evidence. They  
13 haven't been offered in evidence. I have no way to challenge  
14 the witness on anything he's saying. And on that basis, I'd  
15 -- it's not fair to the Plaintiff.

16 THE COURT: All right. Mr. Bonds, can I ask you to  
17 repeat your question? It was muffled and I was about to ask  
18 you to repeat it before I got the objection. So, repeat the  
19 question so I can --

20 MR. BONDS: Okay. I'm going to repeat it and amend  
21 it.

22 THE COURT: Okay.

23 BY MR. BONDS:

24 Q Is it your understanding that those agreements allow you  
25 to share office space with the Debtor?

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1 A Yes. Virtually all of NexPoint's employees share the  
2 Highland office space as part of a shared services agreement.

3 Q Do those agreements allow you to share -- I'm sorry,  
4 excuse me. Strike that. What else do they allow?

5 A Typically is used in coordination of systems, servers,  
6 software, cloud software, Internet software, office software,  
7 tax, accounting, and legal functionality are all part of the  
8 shared services agreement, although, you know, much of -- much  
9 of that was stripped, you know, four or five months ago,  
10 especially legal functionality and the accounting  
11 functionality, without the concurrent adjustment in the  
12 building.

13 Q Okay. And you previously testified that you generally  
14 control NexPoint; is that correct?

15 A Generally. And the distinction I was trying to make is,  
16 you know, following the financial crisis in '08, compliance  
17 and the chief compliance officer has personal liability. along  
18 with the rest of the C Suite, and operates independently, with  
19 primary loyalty to the regulatory bodies. And they're --  
20 they're not controlled, bamboozled, or segued away from their  
21 responsibility. And at all times, they're supposed to be  
22 doing what they believe is right, regulatorily-compliant, and  
23 in the best interest of investors.

24 So that was the distinction I was drawing between, A, what  
25 I was trying to remind Thomas of, that he should be

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1 independent of Seery, in terms of following what he believes  
2 is correct and regulatory-compliant. And I don't have to push  
3 the NexPoint compliance people and general counsel to do  
4 anything specific, nor could I. They are supposed to do what  
5 is right from a regulatory investor standpoint, and I believe  
6 that's what they've done.

7 Q All right. And what do you mean by the term or the usage  
8 of the word "generally"?

9 A Well, that's the distinction I was just drawing. I mean,  
10 generally, on regular business strategy, you know, major  
11 investments, you know, other business items, I'm in control of  
12 those entities. But in terms of the content and allegations,  
13 regulatory opinions that come from compliance and the general  
14 counsel, that is their best views on their own, knowing they  
15 have compliance obligations and personal liability.

16 Q Do you believe that NexPoint and its other owners and  
17 interest holders have rights independent from your own in this  
18 case?

19 A Right, yes, and obligations, and responsibilities to  
20 investors. I believe the attempt by the Debtor or Seery to  
21 hide behind contracts that the Debtor has with the CLOs are --  
22 are a spurious, incomplete argument. You know, they're not in  
23 compliance with those contracts. Bankruptcy alone is an event  
24 of default. Not having the key man -- the key men, the  
25 required requisite professionals that they're obligated to



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1 contractually have working at the Debtor is a clear breach, in  
2 violation of those CLO contracts. Not having adequate staff  
3 or investment professionals to analyze, evaluate, or follow  
4 the investments in the portfolio is a clear violation. And  
5 specifically telling investors in the marketplace that you  
6 plan to terminate all employees, a date certain January 24th,  
7 is a proclamation that you're not going to be in any form able  
8 to be a qualified registered investment advisor or qualified  
9 in any which way to manage the portfolio or be in compliance  
10 with the CLO contracts.

11 I would -- I would further add that the selling of the  
12 securities, and the SKY securities, represent incomplete  
13 intentional incurring of loss against the investors. You have  
14 securities that are less liquid with, you know, restructured  
15 securities that have been owned for ten years, and they were  
16 sold during the most illiquid weeks of the year, the couple  
17 days before and after Thanksgiving, couple days before and  
18 after Christmas, where the investors could have gotten 10 or  
19 15 percent more on their monies if they were just sold in a  
20 normal week. It's -- it's preposterous to me. It's  
21 consistent with Seery not being an investment (garbled).

22 But it's preposterous to me that -- that this treatment of  
23 investors is allowed or being camouflaged as some kind of  
24 contractual obligation, when the investors have said these  
25 funds are clearly in transition and the manager clearly is

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1 incapable of managing them. You know, please don't transact  
2 until the transition is complete. But Jim Seery has traded  
3 every day, including -- I don't know about today, but every  
4 day this week, selling securities for no investment rationale  
5 and no business purpose.

6 Q Are you also portfolio manager for NexPoint?

7 A Yeah, I'm a portfolio manager for the closed-end retail  
8 funds, which do have a higher fiduciary obligation than  
9 anything on the institutional side. I'm a portfolio manager  
10 for those '40 Act funds that are the primary owners of the  
11 CLOs that Seery is selling securities in for some unknown  
12 reason.

13 Q And what shared service agreements exist between NexPoint  
14 and the Debtor?

15 A Those are the shared service agreements I spoke of. I  
16 don't want to repeat myself.

17 Q And I'm going to call Highland Capital Management Fund  
18 Advisors, LP just Fund Advisors. Is that okay with you?

19 A Yes.

20 Q Okay. And you testified generally -- that you generally  
21 control Fund Advisors; is that correct?

22 A Yes.

23 Q Do you believe that Fund Advisors and its owners and  
24 interest holders have rights independent from your own in this  
25 case?

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1 A Yes.

2 Q Are you the portfolio manager for Fund Advisors?

3 A Yes.

4 Q What shared services agreements exist between Fund  
5 Advisors and the Debtor?

6 MR. MORRIS: Objection, Your Honor. The agreements  
7 themselves are the best evidence of the existence in terms of  
8 any agreement between the Debtor and these entities.

9 MR. BONDS: Your Honor, I can fix that.

10 THE COURT: Okay.

11 BY MR. BONDS:

12 Q I'm just asking: What is your understanding, Mr. Dondero,  
13 of the shared service agreements between the Debtor and Fund  
14 Advisors?

15 A It's similar to the agreement I mentioned earlier. It  
16 covers a broad range of centralized services historically  
17 provided by Highland, but now those, while still paying  
18 smaller than historic fees, those entities now have been  
19 required to incur the expenses of duplicating those functions.

20 Q Okay. Do you recall the email string dated November 24th  
21 regarding SKY equity that the Debtor talked about?

22 A Yes.

23 Q What did you mean when you sent that email about the  
24 trade? What did you mean, I'm sorry?

25 A I was trying to inform the traders, and once they knew --

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1 they weren't willing to do the trades anymore once they knew  
2 that the underlying investors had requested that their  
3 accounts not being traded until the transition be -- until the  
4 transition of the CLOs was effectuated.

5 It's -- it's standard by, you know, statute or  
6 understanding, in the money and management business, when  
7 you're moving accounts from one asset manager to another, and  
8 someone requests that you don't do anything to their account,  
9 you don't trade it whimsically. And so I was -- I was making  
10 sure the traders knew that the underlying investors had  
11 requested that no trades occur in their accounts.

12 And then I believed it was a clear violation of the  
13 Registered Investment Adviser's Act. I believe that people  
14 involved at a senior level or at a compliance level could have  
15 material liability, and could create material liability for  
16 the Debtor. And I think if, as I said before, I think if  
17 anybody on this call were to call the SEC, they would start on  
18 audit on this.

19 MR. MORRIS: Your Honor, I move to strike the first  
20 portion of the answer prior to when he started to describe  
21 what he believes and what he thinks. The first portion of the  
22 answer was devoted to testifying about what is in the  
23 knowledge of the people who he was communicating with.  
24 There's no evidence. Mr. Dondero, of course, was free to call  
25 any witness he wanted. He could have called the chief

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1 compliance officer. He could have called the general counsel.  
2 He could have called all the people he's now testifying on  
3 behalf of, and he did not.

4 So I move to strike anything in the record that purports  
5 to reflect or suggest the knowledge on behalf of any party  
6 other than Mr. Dondero.

7 THE COURT: Okay. I'm --

8 MR. BONDS: Let me rephrase -- Your Honor, I'm going  
9 to rephrase the question.

10 THE COURT: Okay. Very well.

11 MR. BONDS: I'm sorry.

12 THE COURT: So the motion to strike is granted. If  
13 you're going to rephrase, go ahead.

14 MR. BONDS: Okay.

15 BY MR. BONDS:

16 Q Mr. Dondero, what did you mean when you said -- that the  
17 emails about the trade?

18 A Okay. I'll give my intention by sending emails to stop  
19 the trade and my basis for those emails. My intentions were  
20 to inform the traders and to inform the compliance people that  
21 I believe there was a trade that wasn't in the best interest  
22 of the employees that had no business purpose for its  
23 occurring. And the people involved weren't aware that the  
24 investors had sent over requests not to trade their accounts  
25 while they were in transition.

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1           So I made the traders aware of that. I made compliance  
2 aware of that also. And it's my belief, based on 30 years'  
3 experience in the industry, that it is entirely inappropriate  
4 to trade the accounts of investors that are in transition, and  
5 especially when you're not -- you're not contractually -- you  
6 are contractually in default with that client, to trade their  
7 account whimsically, for no business purpose. And I thought  
8 it was a clear breach of both regulatory, ethical, and  
9 fairness with regard to the investors.

10           So I -- what did you know, when did you know it, what did  
11 you do? I did what I felt was the right thing, which I try  
12 and do every day, and made all the relevant parties aware of  
13 what was going on.

14       Q    Mr. Dondero, do you recall the text message you sent to  
15 Mr. Seery in which you said, "Be careful what you do"?

16       A    Yes.

17       Q    What did you mean by that message?

18       A    It's -- I even said, Last warning. I mean, I -- he's  
19 doing things against the interests of investors. He's  
20 purposely incurring losses by trading in days and weeks and  
21 time of the year, the day before and after Thanksgiving, where  
22 any novice knows the markets are illiquid and anybody who can  
23 read a computer screen can see you get ten percent less --  
24 five or ten percent less than you would the week before or the  
25 week after. And with as much professional umbrage as

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1 possible, I was recommending that he stop.

2 Q Did you intend to personally threaten Mr. Seery in any  
3 way?

4 A No. It was bad -- bad intentional professional acts  
5 against the interests of investors that flow through to '40  
6 Act retail mom-and-pop investors. I was trying to prevent  
7 those losses and those bad acts from occurring. And I believe  
8 everybody who's -- everybody around that issue should be  
9 ashamed of themselves, in my opinion.

10 Q Do you now regret sending the text?

11 A No. No, I mean, I could have worded it differently. I  
12 was angry on behalf of the investors.

13 Q And Mr. Dondero, you have management ownership interest in  
14 that entity; is that right?

15 A Yes.

16 Q Do you believe the interests or other entities in which  
17 you are involved are independent from your personal rights in  
18 this case?

19 A Yes.

20 Q And do you believe you caused anyone to violate the TRO?

21 A No. I've been -- I've been very conscious to just try and  
22 champion the thing that -- things that I think are important  
23 and the things that I've been tasked to do, like an attractive  
24 pot plan to help resolve this case. I spend time on that.  
25 But every once in a while, do I have to access, let's say,

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1 David Klos, who is the person who put the model together, who  
2 has been working on it for six or nine months, and no one else  
3 S has a copy of? Yes. Yeah, I have to -- I have to access  
4 him. I don't believe that's the -- inappropriate or in any  
5 way violating the spirit of the TRO.

6 I believe settlement in this case is only going to happen  
7 with somebody fostering communication. And Ellington's role,  
8 which I thought was a good one and I thought he was performing  
9 well as settlement counsel, was an important role. And I used  
10 him for things like -- and Seery also used him for things. As  
11 recently as two days before Ellington was fired, Seery gave  
12 him a shared services proposal to negotiate with me.  
13 Ellington has always been the go-between from a settlement and  
14 a legal standpoint. I think his role there was -- it was  
15 valued. To try to honor the TRO was things like Multi-Strat,  
16 that I didn't remember correctly. Ninety percent of the time  
17 or for the last 20 years I would have gone directly to  
18 Accounting and Dave Klos for it, but I purposely went to  
19 settlement counsel in terms of Ellington in order to get the  
20 Multi-Strat information which we needed in order to put the  
21 pot plan together that we went to the Independent Board with  
22 at the end of December.

23 Q (faintly) And do you recall the questions that Debtor's  
24 counsel had regarding the letters sent by K&L Gates to clients  
25 of the Debtor?



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1 MR. MORRIS: I'm sorry, Your Honor. I had trouble  
2 hearing that question.

3 THE COURT: Please repeat.

4 MR. BONDS: Sure.

5 BY MR. BONDS:

6 Q Do you recall the questions Debtor's counsel had regarding  
7 the letters sent by K&L Gates to the clients of the Debtor --  
8 to the Debtor?

9 A Yes.

10 Q You testified on direct that the letters were sent to do  
11 the right thing; is that correct?

12 A Yes.

13 Q What did you mean by that?

14 A I don't want to repeat too much of what I just said, but  
15 the Debtor has a contract to manage the CLOs, which in no way  
16 is it not in default of. It doesn't have the staff. It  
17 doesn't have the expertise. Seery has no historic knowledge  
18 on the investments. The investment staff of Highland has been  
19 gutted, with me being gone, with Mark Okada being gone, with  
20 Trey Parker being gone, with John Poglitsch being gone.

21 And there's -- there's a couple analysts that are a year  
22 or two out of school. The overall portfolio is in no way  
23 being understood, managed, or monitored. And for it to be  
24 amateur hour, incurring losses for no business purpose, when  
25 the investors have requested numerous times for their account

Dondero - Cross

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1 not to be traded, is crazy to me. Where the investors say, We  
2 just want our account left alone. We just want to keep the  
3 exposure. And Jim Seery decides no, there's -- I'm going to  
4 turn it into cash for no reason. I'm just going to sell your  
5 assets and turn them to cash and incur losses by doing it the  
6 week of Thanksgiving and the week of Christmas. I think it's  
7 -- it's shameful. I'm glad the compliance people and the  
8 general counsel at HFAM and NexPoint saw it the same way. I  
9 didn't edit their letters, proof their letters, tell them how  
10 to craft their letters. They did that themselves, with  
11 regulatory counsel and personal liability. They put forward  
12 those letters.

13 MR. MORRIS: Your Honor (garbled) the testimony that  
14 Mr. Dondero just gave about these people saw it. They're not  
15 here to testify how they saw it. We know that Mr. Dondero  
16 personally saw and approved the letters before they went out.  
17 He can testify what he thinks, what he believes. I have no  
18 problem with that. But there should be no evidence in the  
19 record of what the compliance people thought, believed,  
20 understood, anything like that. It's not right.

21 THE COURT: All right. That's essentially a --

22 MR. BONDS: Your Honor?

23 THE COURT: -- a hearsay objection, I would say, or  
24 lack of personal knowledge, perhaps. Mr. Bonds, what is your  
25 response?

Dondero - Cross

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1 MR. BONDS: Your Honor, my response would be that  
2 there are several exhibits the Debtor introduced today that  
3 stand for the proposition that the compliance officers were  
4 concerned. So I think there is ample evidence of that in the  
5 record.

6 THE COURT: I didn't --

7 MR. MORRIS: Your Honor, the letter --

8 THE COURT: I did not understand what you said is in  
9 the record. Say again.

10 MR. BONDS: Your Honor, I'm sorry. The -- there are  
11 -- there are references that are replete in the record that  
12 have to do with the compliance officers' understanding of the  
13 transactions.

14 THE COURT: I don't know what you're referring to.

15 THE WITNESS: Your Honor?

16 THE COURT: I've got a lot of exhibits. You're going  
17 to have to point out what you think --

18 THE WITNESS: Can I -- can I -- can I -- can I answer  
19 for -- that for a second? The letters that were signed by the  
20 compliance people or by the businesspeople at NexPoint and  
21 HFAM objecting to the transactions, those letters were their  
22 beliefs, their researched beliefs. They weren't --

23 THE COURT: Okay.

24 THE WITNESS: -- micromanaged by me. You know, they  
25 weren't -- I agree with them, but those weren't my beliefs

Dondero - Cross

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1 that they've stated. Those were their own beliefs and their  
2 own research, --

3 THE COURT: All right.

4 THE WITNESS: -- and the record should reflect --

5 THE COURT: This is clearly hearsay. I mean, it's  
6 one thing to have a letter, but to go behind the letter and  
7 say, you know, what the beliefs inherent in the words were is  
8 inadmissible. All right? So I strike that.

9 THE WITNESS: Maybe ask your question again.

10 BY MR. BONDS:

11 Q Yeah. What is your understanding of the rights that these  
12 parties had and what do you believe that was intended to be  
13 conveyed by the compliance officers?

14 MR. MORRIS: Objection. Calls -- calls for Mr.  
15 Dondero to divine the intent of third parties. Hearsay.

16 THE COURT: I sustain.

17 MR. BONDS: Your Honor, --

18 MR. MORRIS: No foundation.

19 MR. BONDS: -- I don't agree. I think that this is  
20 asking Mr. Dondero what he thinks.

21 MR. MORRIS: The letters speak for themselves, Your  
22 Honor.

23 THE COURT: Okay. I sustain --

24 MR. MORRIS: And Mr. --

25 THE COURT: I sustain the objection.

Dondero - Cross

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1 MR. MORRIS: All right. Thank you.

2 THE WITNESS: Ask me what I know. Or ask me what my  
3 concerns --

4 BY MR. BONDS:

5 Q Let me ask you this. What were your concerns relating to  
6 the compliance officers' exhibit?

7 A My concerns regarding the transaction, the transactions,  
8 which may repeat what I've said before, but I do want to make  
9 sure it gets in the record. So if we have to make a -- these  
10 were my concerns, whether or not they were the compliance  
11 people's concerns. I believe they were, and I believe they  
12 were similar, but I'm just going to say these are -- these  
13 were my concerns.

14 The Debtor, with its contractual -- with its contract with  
15 the CLOs, were in no way -- was in no way compliant with that  
16 contract or not in default of that contract. Bankruptcy is a  
17 reason for default. Not having the key men specified in the  
18 contract currently employed by the Advisor is a violation.  
19 Not having adequate investment staff to manage the portfolio  
20 is a violation of that contract. Announcing that you're  
21 laying off everybody and will no longer be a registered  
22 investment advisor is proclaiming that you, if you even have  
23 any -- any -- pretend that you're qualified or in compliance  
24 with the contract now, you're broadcasting that you won't be  
25 in three weeks, are -- are all mean that you're not in good

Dondero - Cross

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1 standing. Okay? Number one.

2 Number two, when the investors know that it's in  
3 transition, you're not in compliance as a manager, you're not  
4 going to be an RIA in three weeks, the accounts are going to  
5 have to transition to somebody else in three weeks, and the  
6 investors ask you, Please don't trade my accounts between now  
7 and then, that is -- that is a -- if it's not a *per se*, it's  
8 an ethical and a spirit violation of any relationship between  
9 an investor and an asset manager.

10 To then sell assets -- not replace assets, just sell  
11 assets for cash -- and purposely do it on the least liquid  
12 days of the year -- the day before Thanksgiving, the day after  
13 Thanksgiving, the week of Christmas, this past week, whatever  
14 -- to purposely incur losses so that the investors suffer ten  
15 or fifteen percent losses that other -- on each of those sales  
16 that they wouldn't otherwise have to incur, and for no stated  
17 business purpose, for no investment rationale, with no staff  
18 to even say whether the investment is potentially going up or  
19 down, is -- is -- is -- I've never seen anything else like it.

20 And I will stand up and say it every day: I'm glad the  
21 letters went out from HFAM and from NexPoint. I would never  
22 recommend they get retracted. And I believe everybody who  
23 signed those letters meant everything in those letters. And I  
24 believe the letters are correct. And I believe the whole  
25 selling of CLO assets is a travesty.

Dondero - Cross

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1 My personal opinion, we need an examiner or somebody here  
2 to look at this junk and look at some of the junk that  
3 occurred earlier this year. This -- this stuff is  
4 unbelievable to me.

5 Q Generally, who holds interests in the CLOs?

6 A A vast majority of the CLOs that we're speaking of that  
7 Seery has been selling the assets of are owned by the two  
8 mutual funds, the two '40 Act -- the two '40 Act mutual funds  
9 and the DAF. Between them, I think out of -- eleven out of  
10 the sixteen CLOs, they own a vast majority, and then I think,  
11 whatever, two or three they own a hundred percent, and I think  
12 two or three they own a significant minority.

13 And just because they don't own a hundred percent doesn't  
14 somehow allow a registered investment advisor to take  
15 advantage of an investor. And I -- I've never understood that  
16 defense. I wouldn't be able -- in my role of 30 years, I  
17 wouldn't be able to tell that to an investor, that, hey, you  
18 had a contract with us, we did something that wasn't in your  
19 best interest, but we got away with it because you didn't own  
20 a hundred percent, you only owned eighty percent.

21 MR. MORRIS: Your Honor, I move to strike. There's  
22 no contract between the Debtor and Mr. Dondero's -- and the  
23 entities that he owns and controls for purposes of the CLO.  
24 The only contract is between the Debtor and the CLOs  
25 themselves.

Dondero - Cross

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1 THE COURT: All right. Well, I overrule whatever  
2 objection that is. Again, if you want to bring something out  
3 on cross-examination or through Mr. Seery, you know, you're  
4 entitled to do that.

5 All right. Please continue.

6 BY MR. BONDS:

7 Q Do you believe these letters were sent by the Funds to the  
8 Advisors because they are trying to protect the independent  
9 entities?

10 A They're trying to protect their investors. They were  
11 trying to protect their regulatory liability for activities  
12 they see that are not in the best interests of investors.

13 MR. MORRIS: Objection, Your Honor. I move to  
14 strike. He's again testifying as to the intent of the people  
15 who sent the letters who are not here to testify today.

16 THE COURT: Sustained.

17 BY MR. BONDS:

18 Q Mr. Dondero, what is your belief as to the letters that  
19 were sent by the Funds and Advisor? Is -- are they trying to  
20 protect their independent interests?

21 MR. MORRIS: Objection, Your Honor. Asked and  
22 answered.

23 THE COURT: Sustained.

24 THE WITNESS: Ask me --

25 BY MR. BONDS:



Dondero - Cross

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1 Q What is your understanding of why the letters were sent?

2 MR. MORRIS: Objection, Your Honor. Asked and  
3 answered.

4 THE COURT: Sustained.

5 BY MR. BONDS:

6 Q Mr. Dondero, would you have sent the letters?

7 A I would have sent the letters exactly or very similar or  
8 probably even more strongly than the letters were stated, for  
9 the purposes of protecting investors, to protecting mom-and-  
10 pop mutual fund investors from incurring unnecessary losses by  
11 an entity that was no longer in compliance with their -- with  
12 their asset management contract and because the investors had  
13 requested that their account just be frozen until it was  
14 transitioned.

15 That's why I would have sent the letter. That's why I  
16 believe the letter should be sent. That's why I'm happy they  
17 were sent. That's why we've never retracted.

18 Q Mr. Dondero, who is Jason Rothstein?

19 THE COURT: I did not hear the question.

20 THE WITNESS: Jason -- Jason --

21 MR. BONDS: Who --

22 THE COURT: Please repeat.

23 MR. BONDS: Yes. I asked Mr. Dondero who Jason  
24 Rothstein was.

25 THE WITNESS: Jason Rothstein heads up our systems

Dondero - Cross

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1 department at Highland Capital.

2 BY MR. BONDS:

3 Q Can you explain what your text message to Mr. Rothstein  
4 was about?

5 A Which text message? The one where it was in the drawer?

6 Q Yeah.

7 A Uh, --

8 Q And that was actually from him, not you.

9 A Yeah. That was from him. I think he transferred icons or  
10 set up personal stuff to the new phone, and he was just saying  
11 that the old phone was in Tara's drawer.

12 Q And you don't know whether -- what's happened to the  
13 phones, do you?

14 A No. Like I said, I believe they've been destroyed, but I  
15 -- I can find out. I mean, I can query and find out who  
16 destroyed it, if that's important.

17 Q And you understood that you were not supposed to talk to  
18 the Debtor's employees; is that correct?

19 A Like I said, except for my roles regarding shared  
20 services, the pot plan, and trying to reach some type of  
21 settlement, I've had painfully few conversations with the  
22 Debtor's employees.

23 Q When you talked to certain employees, did you think it was  
24 an -- under an exception to the TRO, like shared services,  
25 related to the pot plan, or settlement communications?

Dondero - Cross

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1 A Yes.

2 MR. MORRIS: Your Honor, I move to strike. Mr.  
3 Dondero never read the TRO. He's got no basis to say what the  
4 TRO required and didn't require.

5 MR. BONDS: That wasn't the -- that wasn't the  
6 question.

7 THE COURT: Okay.

8 MR. BONDS: I'm sorry.

9 THE COURT: Okay. Rephrase the question, please.

10 MR. BONDS: Okay. I'm sorry.

11 BY MR. BONDS:

12 Q When you talked to these -- to certain employees, did you  
13 think it was under an exception to the TRO, like shared  
14 services, relating to the pot plan, or settlement  
15 communications?

16 A Yes. Absolutely.

17 MR. MORRIS: I object. No foundation.

18 THE COURT: Sustained.

19 BY MR. BONDS:

20 Q Mr. Dondero, do you understand -- did your lawyers explain  
21 to you the TRO?

22 A Yes.

23 Q And who was the lawyer that explained the TRO to you?

24 MR. MORRIS: Your Honor, I don't know if we're  
25 getting into a waiver of privilege, but I just want to tell

Dondero - Cross

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1 you that my antenna are up very high.

2 THE COURT: Okay. Mine are as well, Mr. Bonds. Are  
3 you about to waive the privilege?

4 MR. BONDS: No, Your Honor, I am not.

5 THE COURT: Okay. Well, it sounded like perhaps we  
6 were about to have the witness testify about conversations he  
7 had with lawyers.

8 MR. BONDS: I'm sorry, Your Honor. That was not my  
9 intention. Again, I'm asking Mr. Dondero to explain for us  
10 his contact with -- or, his impression of the TRO.

11 BY MR. BONDS:

12 Q What did the TRO mean to you?

13 A The TRO meant to me that I was precluded from talking to  
14 Highland employees -- which, again, very few, if any, were  
15 coming into the office. I was not talking to Highland  
16 employees with any regularity anyway. But there was an  
17 exception with regard to Scott Ellington regard -- Scott  
18 Ellington in terms of him functioning as settlement attorney  
19 to try and bridge the U.C.C., the Independent Board, Jim  
20 Seery, other people, and things that impacted me or other  
21 entities.

22 I also viewed that there was an exception for the pot  
23 plan, which had been presented and gone over as recently as  
24 December 18th and 20th. And -- or December 18th, I think, was  
25 the date.

Dondero - Cross

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1 And you know what, I want to clarify a characterization of  
2 the pot plan. I still believe it's the best and most likely  
3 alternative for this estate in the long run. I think what  
4 we've proposed numerous times is more generous than what  
5 anyone will receive in a liquidation and in a more timely  
6 fashion.

7 And the last time we presented it to the Independent  
8 Board, the Independent Board thought it was attractive and  
9 thought we should go forward with it to the U.C.C. and other  
10 parties.

11 MR. MORRIS: Your Honor, I move to strike the last  
12 portion of the answer that purports to describe what the  
13 Independent Board thought.

14 THE COURT: Well, --

15 MR. MORRIS: No foundation. Hearsay.

16 THE COURT: What is your response to the hearsay  
17 objection, Mr. Bonds?

18 MR. BONDS: Your Honor, I don't have one.

19 THE COURT: Okay. I sustain.

20 BY MR. BONDS:

21 Q What exceptions did you believe there were for  
22 communications with employees?

23 A Okay. Thank you. Yeah. Like I said, I covered Scott  
24 Ellington and settlement counsel. I covered the pot plan.

25 Q Okay.

Dondero - Cross

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1 A My -- my view of the pot plan as -- my view of the pot  
2 plan was that it was very attractive, and I had received  
3 encouragement to go forward with it as something that should  
4 be workable. That's my testimony on that.

5 And then -- and we talk about negotiating shared services.  
6 So, there's shared services in terms of overlap in  
7 functionality, but there's also, in terms of negotiating the  
8 shared services agreement, which, as I said, was something  
9 that Ellington was put in charge of three or four days ago by  
10 Jim Seery to negotiate with us. And he reached out to me to  
11 negotiate it. And I think the Pachulski deadline on it was  
12 three days later. That whole process was something that I  
13 viewed as separate from the TRO, especially since it was  
14 initiated by Jim Seery, DSI, et cetera, and consistent with  
15 what Scott Ellington's role had been for the last six, nine  
16 months.

17 Q As to the Debtor's request that you vacate the office  
18 space, did you comply with this request?

19 A Yes.

20 Q What did you think that vacating meant?

21 A I moved out all my -- my personal items to a new office at  
22 NexBank.

23 Q (faintly) And, in fact, did you work on the last day over  
24 to 3:00 a.m.?

25 A Yes. 4:00.

Dondero - Cross

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1 THE COURT: Mr. Bonds, I didn't hear your question.  
2 I didn't hear your question.

3 MR. BONDS: Okay. I'm sorry.

4 BY MR. BONDS:

5 Q Did -- isn't it true that you worked through the night, to  
6 3:00 or 4:00 a.m., to vacate the premises?

7 A Yes. Until 4:00 a.m. on the last day, to organize and  
8 pack up all my stuff, yes.

9 Q Did you think your presence in the office, with no other  
10 employees there, violated the spirit of the TRO?

11 A No. I thought it was over the top and meant to tweak me,  
12 but, yeah, there's no -- there's not Debtor employees coming  
13 in since COVID.

14 Q (faintly) Okay. And you thought you could talk to Mr.  
15 Ellington and -- as settlement counsel; is that correct?

16 MR. MORRIS: I'm having trouble hearing it, Your  
17 Honor.

18 THE WITNESS: Yes.

19 THE COURT: Yeah. We're -- Mr. Bonds, please make  
20 sure you speak into the device.

21 MR. BONDS: I'm sorry. I'll try to get closer.

22 Okay. I asked the Debtor -- or I, excuse me, I asked Mr.

23 Dondero if he thought he could talk to Ellington as a go-

24 between or settlement counsel. And I asked him if that was

25 correct.

Dondero - Cross

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1 THE WITNESS: Yes. For settlement, shared services,  
2 the pot plan. Nothing that interrupts or affects the Debtor,  
3 but for those purposes, as has consistently occurred for the  
4 last six months.

5 BY MR. BONDS:

6 Q Okay. And you saw the texts and emails presented by the  
7 Debtor between you and Mr. Leventon; is that correct?

8 A The one regarding Multi-Strat?

9 Q Yes.

10 A Yes.

11 Q In your understanding, did you believe those  
12 communications were allowed under the TRO?

13 A Well, yes. And, again, to clarify my -- my contrasting  
14 testimony, I would never typically have gone to them for that  
15 kind of information, but to be compliant with the TRO, for  
16 Multi-Strat information, which I needed in order to put  
17 together the pot plan that the Independent Board audienced on  
18 December 18, I needed the information on Multi-Strat, and I  
19 requested it as appropriate through settlement counsel  
20 Ellington. And I think Ellington requested it from Isaac, who  
21 requested it from David Klos.

22 The whole purpose, I believe -- my belief is the whole  
23 purpose of this TRO is to make it impossible for us to get  
24 information to come up with alternatives other than a -- the  
25 plan proposed by Jim Seery. It's our -- if -- if -- without



Dondero - Cross

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1 Ellington in the go-between, which he's now no longer an  
2 employee, I assume the only way we get any information,  
3 balance sheet or anything from Highland Capital, is with a  
4 subpoena.

5 And as much as I've tried to engage or make an attractive  
6 pot plan for everybody, each one of them has been a complete  
7 shot in the dark, without even knowing the assets and  
8 liabilities of Highland, but just estimating where they were  
9 or were likely to be.

10 Q Do you believe your text message with Leventon caused any  
11 harm to the Debtor's business?

12 A No. It potentially fostered a pot plan, because, you have  
13 to know, the pot plan needed -- one of the aspects of the pot  
14 plan was the --

15 Q Do you still want to advocate for your pot plan?

16 A I think that's eventually where we ultimately end up. Or  
17 -- or should end up. Otherwise, I fear it's going to be an  
18 extended, drawn-out process.

19 Q And how much did you initially propose to pay creditors in  
20 this case?

21 A The most recent -- the most recent pot plan?

22 Q No. The -- initially.

23 A The initial pot plan, I believe, was \$160 million.

24 Q And what about the notes?

25 A There was \$90 [million] of cash and I believe \$70

Dondero - Cross

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1 [million] of notes.

2 Q And what is Multi-Strat?

3 A Multi-Strat is a fund that's managed by Highland. They  
4 used to have \$40 or \$50 million in value. It used to contain  
5 a lot of life settlement policies. And I believe now has \$5  
6 or \$6 million of value, after assets have been sold.

7 Q Do you recall the email Debtor's counsel presented  
8 regarding the balance sheet today?

9 A The balance sheet of Multi-Strat?

10 Q Correct.

11 A Yes.

12 Q Do you believe you were entitled to see that document?

13 A Yes. It's just -- again, for the pot plan, I needed it.  
14 But also I'm an investor in that fund and I'm entitled to it.  
15 It's -- there was nothing in there that was improper or  
16 untoward or in any way damaged the Debtor.

17 Q And you recall the request for documents sent by the  
18 Debtor; is that correct?

19 A On my -- my personal estate plan?

20 Q No, on Multi-Strat.

21 A The Debtor's request on -- I'm sorry. What was that?

22 Q The Debtor sent you a request for Multi-Strat. For Duga  
23 -- I'm sorry.

24 A For Dugaboy? Okay.

25 Q Dugaboy.

Dondero - Cross

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1 A Yeah. There's -- there's personal estate planning trusts.  
2 Some are active. Some are inactive. Some have been around  
3 for 15 years. But they're -- they're not assets or anything  
4 that's related to the estate. And that was -- that was my  
5 text to Melissa that said, you know, Not without a subpoena.

6 Q Mr. Dondero, if you remember back on Exhibit K, there was  
7 some request that you terminate your offices at the Crescent,  
8 and I think you were given seven days' notice to do that. Do  
9 you know if Christmas occurred during that time?

10 A I believe it did.

11 Q So, if Christmas and Christmas Eve are both holidays, how  
12 many days, business days, did they give you to terminate or to  
13 get out of the space?

14 A There would have been three business days. It was Monday  
15 through Wednesday that I moved out.

16 MR. BONDS: Your Honor, I'll pass the witness.

17 THE COURT: All right. Mr. Morris?

18 THE WITNESS: Take a break. I hope.

19 MR. BONDS: Your Honor, I'm sorry, can I take a ten-  
20 minute break? I think that I'm going to be through, but I  
21 don't know.

22 THE COURT: All right. I'll give you a ten-minute  
23 break.

24 MR. BONDS: All right. Thank you, Your Honor.

25 THE COURT: We're coming back at 2:15.

Dondero - Cross

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1 THE CLERK: All rise.

2 (A recess ensued from 2:06 p.m. until 2:16 p.m.)

3 THE CLERK: All rise.

4 THE COURT: All right. Please be seated. We're back

5 on the record in Highland versus Dondero. Mr. Bonds, do you

6 have more examination?

7 MR. BONDS: Your Honor, I have one question.

8 THE COURT: Okay.

9 MR. BONDS: And that's --

10 MR. LYNN: And one more witness.

11 MR. BONDS: And one more witness.

12 CROSS-EXAMINATION, RESUMED

13 BY MR. BONDS:

14 Q Do you think that Scott Ellington and Isaac Leventon were  
15 treated appropriately by the Debtor?

16 A No, I do not. I don't think they've been treated fairly,  
17 nor do I think other senior employees have been treated  
18 fairly. I've never seen a bankruptcy like this where, during  
19 complex unwinding of 20 years of various different entities  
20 and structures, relying on the staff, working them hard,  
21 working overtime, a lot of investment professionals like  
22 lawyers and DSI just putting their name on the work of stuff  
23 that was done by internal employees, getting to the end of the  
24 year, trying to pay people zero bonuses and retract prior  
25 years' bonuses, and try and come up with legal charges against

Dondero - Cross

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1 those people is unusual to this case and my experience, in the  
2 bankruptcies we've been involved in, where typically  
3 management teams get paid multiples of current salary to stay  
4 on and be the experts.

5 I also think they were put in difficult spots from the  
6 very beginning. It was Jim Seery that made Scott Ellington  
7 the settlement counsel six, seven months ago. It was a  
8 broadly-defined role that was never retracted, never adjusted,  
9 never modified, yet somehow he and Isaac violated it. I don't  
10 know. I haven't spoken to them since they've been terminated.  
11 They aren't allowed to speak to me, from what I hear. But I  
12 wish them luck in their claims.

13 THE COURT: Okay. You pass the witness?

14 MR. BONDS: Yes, Your Honor.

15 THE COURT: All right. Mr. Morris, do you have  
16 further examination?

17 MR. MORRIS: Just a few questions.

18 REDIRECT EXAMINATION

19 BY MR. BONDS:

20 Q Mr. Dondero, you knew about this hearing for some time,  
21 right?

22 A No.

23 Q When did you first learn this hearing was going to take  
24 place?

25 A Two days ago.

Dondero - Redirect

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1 Q Two days ago?

2 A When was the depo, three days ago? Whatever.

3 Q And you didn't know prior to the deposition that we would  
4 be having a hearing today on the Debtor's motion for a  
5 preliminary injunction?

6 A No. I thought it was going to be postponed or canceled.  
7 I was waiting for the text last night.

8 Q You had an opportunity to call any witness in the world  
9 you wanted to today, right?

10 A I guess.

11 Q You could have called -- you could have called the chief  
12 compliance officer at the Advisors if you thought the Court  
13 should hear from him as to the compliance issues that you've  
14 testified to, right?

15 A I think their letters stand on their own.

16 Q Okay. So you didn't think that it was important for the  
17 Court to hear from Mr. Sowin directly, correct?

18 A Sowin is a trader.

19 Q I'm sorry. Who's the chief compliance officer of the  
20 Advisors?

21 A Jason Post, as far as NexPoint is concerned. He's the one  
22 that would have been behind the K&L -- K&L letters.

23 Q And he is not here today to testify, right?

24 A I think his letters stand on their own and I think  
25 everybody should read them, make sure they read them.

Dondero - Redirect

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1 Q Okay. But Mr. Post is not here to answer any questions;  
2 is that right?

3 A I don't know if there are any questions beyond what's  
4 obviously stated in the letters. You should read the letters  
5 carefully. They're -- they're -- they talk about clear  
6 violations.

7 MR. MORRIS: Your Honor, I move to strike. It's a  
8 very simple question.

9 THE COURT: Sustained. That was another yes or no  
10 answer, Mr. Dondero. Go ahead.

11 THE WITNESS: I'm sorry.

12 BY MR. MORRIS:

13 Q Mr. Dondero, Mr. Post is not here to testify in order to  
14 explain to the Court what he thinks the regulatory issues are,  
15 correct?

16 A He's not here today.

17 Q And you could have called him as a witness, correct?

18 A Yes.

19 Q And you thought Mr. Ellington and Mr. Leventon were  
20 treated unfairly, right?

21 A Yes.

22 Q And there's no reason why they couldn't have come today to  
23 testify, correct?

24 A I guess they could have.

25 Q And there's no reason why anybody on behalf of the K&L

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1 Gates clients couldn't have been here to testify, correct?

2 A I didn't deem it necessary, I guess.

3 Q Okay. You could have offered into evidence, at least  
4 offered into evidence, any document you wanted, right?

5 A Yes.

6 Q And you could have offered the judge, for example, the  
7 shared services agreement, the shared services agreements for  
8 which you gave the Court your understanding, right?

9 A Which shared services, the one that Seery gave Ellington  
10 three days ago or the original one from years ago?

11 Q Any of the ones -- any of the ones that you have referred  
12 to today. You could have given any of them to the judge,  
13 right?

14 A Correct.

15 Q And you didn't, right?

16 A I did not.

17 Q In fact, there's not a single piece of evidence in the  
18 record that corroborates anything you say; isn't that right?

19 A I -- I believe all those documents are in the record.  
20 They're just not in the record of this TRO. But they're all  
21 --

22 Q Oh.

23 A They're all in the record.

24 Q Do you remember that there was a hearing on December 16th?  
25 I think you -- you testified that you're fully aware of that



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1 hearing that was brought by the K&L Gates Clients. Do you  
2 remember that?

3 A Yes.

4 Q Who testified at that hearing on behalf of the K&L Gates  
5 Clients? Dustin Norris?

6 A I believe -- I believe Dustin Norris testified.

7 Q Uh-huh. And what's Mr. Norris's role at the Advisors?

8 A He's one of the senior managers.

9 Q Is he a compliance officer?

10 A No.

11 Q Is he a trader?

12 A No. But he's one of the senior managers.

13 Q Okay. They could have called anybody they wanted, to the  
14 best of your understanding, right?

15 A I don't think they got a chance to. Wasn't it an  
16 abbreviated hearing?

17 Q They offered Mr. Norris as a witness. Do you understand  
18 that?

19 A I -- all I -- I wasn't there. I didn't attend virtually.  
20 I -- but I did know that Norris testified. But I don't know  
21 who else was called, wasn't called, was going to be called,  
22 was on the witness list. I have no awareness.

23 Q Okay. You were pretty critical of the trades that Mr.  
24 Seery wanted to make that you interfered to stop, right?

25 A I think he's subsequently done most of those trades.

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1 Q And you called them preposterous because he wanted to do  
2 it around Thanksgiving or around Christmas, at least based on  
3 your testimony, correct?

4 A That's when it did occur.

5 Q And is it your testimony -- is it your testimony that  
6 every single person in the world who trades securities near a  
7 holiday is making a preposterous trade?

8 A I think it's amateur and not what an investment  
9 professional would do.

10 Q So you never trade on holidays; is that your testimony?  
11 You've never done it once in your life?

12 A Very rarely, unless there's another overriding reason.  
13 And there was no overriding reasons, period.

14 Q How would you know that when you didn't even ask Mr. Seery  
15 why he wanted to make the trades?

16 A I asked Joe Sowin, who asked Jim Seery. And Joe Sowin  
17 said that Jim Seery just said for risk reduction.

18 MR. MORRIS: I move to strike on the grounds that  
19 it's hearsay, Your Honor.

20 THE COURT: Sustained.

21 BY MR. MORRIS:

22 Q You never asked Mr. Seery why he wanted to make the  
23 trades, correct?

24 A I'm not allowed to talk to Mr. Seery.

25 Q You certainly were around Thanksgiving; isn't that right?

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1 A I don't know.

2 Q There was no TRO in place at that time, correct?

3 A That's true.

4 Q You're pretty critical of Mr. Seery and his capabilities;  
5 is that right?

6 A He's a lawyer. He's not an investment professional.

7 Q Did you object to his appointment as the CEO of the  
8 Debtor?

9 A No.

10 Q Have you made any motion to the Court to have him removed  
11 as unqualified?

12 A Not yet.

13 Q Okay. But with all the knowledge of all the preposterous  
14 things that he's been doing for months now, you haven't done  
15 it, right?

16 A No.

17 Q When you -- when -- before you threw the phone in the  
18 garbage, did you back it up?

19 A No.

20 Q Did it occur to you that maybe you should save the data?

21 A No.

22 Q You said that the only way you think you might be able to  
23 get information going forward is through a subpoena. Do I  
24 have that right?

25 A I mean, that's how it seems. I mean, it seems at every

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1 turn -- and now with Scott Ellington being gone and Isaac  
2 being gone -- I have no idea how the Debtor is ever going to  
3 defend against UBS.

4 THE COURT: I did not --

5 THE WITNESS: I have no idea how --

6 THE COURT: I didn't hear the answer after with  
7 Ellington and Leventon being gone. I didn't hear the rest of  
8 the answer. Could you repeat?

9 THE WITNESS: I said I have no idea how the Debtor is  
10 ever going to defend itself against UBS. But I also have no  
11 idea how we're ever going to get any information or ever push  
12 forward any kind of settlement without having any access to  
13 information or anybody to talk to.

14 BY MR. MORRIS:

15 Q Do you trust Judge Lynn?

16 (Echoing.)

17 A Yes.

18 Q Is he a good advocate?

19 A Yes. If anybody returns his phone calls.

20 Q Do you recall that on October 24th Judge Lynn specifically  
21 asked my law firm to provide information on your behalf in  
22 connection with the Debtor's financial information, their  
23 assets and their liabilities?

24 A Yes.

25 Q Do you recall that the Debtor simply asked that you

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1 acknowledge in an email between and among counsel that you  
2 would abide by the confidentiality agreement that was entered  
3 by the Court?

4 A I wasn't involved in those details.

5 Q Didn't you send an email in which you agreed to receive  
6 the financial information subject to the protective order that  
7 this Court entered?

8 A I'm sure I would. I just don't remember.

9 Q That was a condition that the Debtors made. That doesn't  
10 refresh your recollection?

11 A I'm not denying it. I just don't remember, and --

12 Q Okay. And --

13 A (overspoken)

14 Q I'm sorry, I don't mean to cut you off. And in fact, on  
15 December 30th, the day you were supposed to vacate the office,  
16 the Debtor voluntarily provided to Judge Lynn all of the  
17 information that had been requested on your behalf without the  
18 need for a subpoena, right?

19 A Yeah. It took a week. It's 40,000 pages of mixed  
20 gobbledygook that we're -- we're going through. But it should  
21 provide enough information for us to negotiate a pot plan if  
22 anybody so chose.

23 Q So you didn't need to (echoing) the 40,000 pages of  
24 financial information from the Debtor; all you needed was an  
25 agreement that you would abide by the protective order.

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1 Correct?

2 A I think that was the first thing that was ever produced on  
3 request that I can remember. But yes.

4 Q And it was just a week ago, right?

5 A Yes.

6 MR. MORRIS: I have no further questions, Your Honor.

7 THE COURT: All right. Mr. Bonds, do you have  
8 anything else?

9 MR. BONDS: I do not, Your Honor, as to this witness.  
10 I have one other witness.

11 THE COURT: All right.

12 MR. MORRIS: Your Honor, I don't know who they plan  
13 on calling, but he's not on the witness list.

14 THE COURT: All right. Well, --

15 MR. BONDS: Your Honor, this other witness --

16 THE COURT: Just a moment. This concludes, for the  
17 record, Mr. Dondero's testimony. But, obviously, stick  
18 around, because we're going to have a lot to talk about when  
19 this is finished as far as the evidence.

20 All right. Now, who are you wanting to call that you did  
21 not identify?

22 MR. BONDS: I'd like to call Mike Lynn for the  
23 purpose -- or, to -- as a rebuttal witness.

24 THE COURT: Lawyer as witness?

25 MR. MORRIS: Your Honor?

1 THE COURT: Well, you know, first off, rebuttal of  
2 what? Rebuttal --

3 MR. MORRIS: Exactly. He's going to rebut his own  
4 client, Your Honor? He's going to rebut his own client?  
5 There's only been one witness to testify here. He was on  
6 their exhibit list. How do they call a witness to rebut their  
7 own client?

8 THE COURT: Yes. What -- I don't --

9 MR. BONDS: Your Honor?

10 THE COURT: Go ahead.

11 MR. BONDS: Mr. Morris testified or attempted to  
12 testify that the pot plan didn't gain any traction. We will  
13 submit Mike Lynn on that issue.

14 THE COURT: No.

15 MR. MORRIS: Your Honor?

16 THE COURT: I'm not going to allow a lawyer to  
17 testify to rebut lawyer argument. That's very inappropriate,  
18 in my view. So, not going to happen.

19 MR. LYNN: (garbled)

20 MR. BONDS: Your Honor, he would be a fact witness to  
21 discussions with the other side.

22 MR. MORRIS: Your Honor, I strenuously object.  
23 They're -- he's only rebutting -- my questions are not  
24 evidence. The only evidence in the record is Mr. Dondero's  
25 testimony. Mr. Dondero is their client. Mr. Dondero was on

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1 their witness list. They should not be permitted to call any  
2 witness, with all due respect to Mr. Lynn, to rebut their own  
3 witness.

4 THE COURT: All right.

5 MR. BONDS: Your Honor, we're not rebutting our  
6 witness. We are rebutting the testimony that Mr. Morris gave.

7 THE COURT: Mr. Morris is a lawyer. He makes  
8 argument. He asks questions. He was not a witness today.  
9 Okay?

10 So if you want to say whatever you want to say as lawyers  
11 in closing arguments, then obviously you can do that. But I'm  
12 not going to allow a lawyer to be a witness to rebut something  
13 another lawyer said in argument or in a question. I -- it's  
14 -- so, I disallow that.

15 Anything else, then?

16 MR. BONDS: No.

17 THE COURT: Okay. And while we're talking about  
18 procedure, actually, Mr. Morris, it's the Debtor's motion, and  
19 I'm not even sure that's all of your evidence. So, do you  
20 have any more evidence as Movant?

21 MR. MORRIS: No, Your Honor. The Plaintiff and the  
22 Debtor rest.

23 THE COURT: All right. So, at the risk of repeating,  
24 now that the Movant has rested, it would be Mr. Dondero's  
25 chance to put on supplemental evidence. But what I'm hearing



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1 from Mr. Morris is there were no witnesses identified on your  
2 witness list?

3 MR. BONDS: Other than Mr. Dondero, Your Honor.

4 THE COURT: Okay. All right. Well, was there any  
5 stipulated documentary evidence that -- that you had --

6 MR. BONDS: No, Your Honor.

7 THE COURT: All right. Well, I guess we're done with  
8 evidence.

9 Mr. Morris, your closing argument?

10 MR. MORRIS: All right. Before I get to that, Your  
11 Honor, I just want to make a very brief statement. When the  
12 Debtor objected to Mr. Dondero's emergency motion for a  
13 protective order, the Debtor stated that it sought discovery  
14 from Mr. Dondero to determine whether Mr. Dondero may have  
15 violated the TRO by interfering and impeding the Debtor's  
16 business, including by potentially colluding with UBS. After  
17 that motion was decided, both Mr. Dondero and UBS produced  
18 documents to the Debtor.

19 Based on the review of that information, the Debtor found  
20 no evidence that Mr. Dondero and UBS colluded to purchase  
21 redeemed limited partnership interests of Multi-Strat, nor any  
22 inappropriate conduct by UBS or its counsel.

23 The Debtor appreciates the opportunity to clear that part  
24 of the record.

25 THE COURT: All right.

1 CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

2 MR. MORRIS: Now, with respect to the motion at hand  
3 today, Your Honor, I want to take you back just about a month  
4 ago to December 10th, 2020. At that time, we had a hearing on  
5 the Debtor's motion for a TRO. The motion had been filed in  
6 advance. Mr. Dondero had filed an objection. He had concerns  
7 about the scope and the language of the terms of the proposed  
8 TRO.

9 And at that hearing, Your Honor, if you'll recall, you  
10 listened carefully to the arguments that were made on behalf  
11 of Mr. Dondero. You heard carefully -- you listened carefully  
12 to the proposed changes that he sought to make. And you went  
13 through that proposed TRO word by word, Paragraph 2 and 3, and  
14 you read them out loud, and you made decisions at that time as  
15 to whether the Court believed any portion of that was  
16 ambiguous or whether it was clear. You made determinations at  
17 that time whether or not the provisions were reasonable.

18 Mr. Dondero wasn't there. He didn't read the transcript.  
19 He has no idea what you said. But his lawyers were there, and  
20 they had an opportunity to object and they had an opportunity  
21 to make comments, and the order is what the order is. And for  
22 whatever reason, Mr. Dondero chose not to read it, or,  
23 frankly, even understand it, based on his testimony.

24 The fact is, Your Honor, the one thing that the evidence  
25 shows very clearly here is that Mr. Dondero thinks that he is

1 the judge. He believes that he is the decider. He believes  
2 that he decides what the TRO means, even though he never read  
3 it. He believes that he decides what exceptions exist in the  
4 TRO, even though he never read it.

5 He believes that he decides that it's okay to ditch the  
6 Debtor's cell phone without even seeking, let alone obtaining,  
7 the Debtor's consent. I guess he decides that he can ditch  
8 the phone and trash it without seeking to back it up or  
9 informing the Debtor.

10 Mr. Dondero believes that he gets to decide that it's okay  
11 to take a deposition from the Debtor's office, even when the  
12 Debtor specifically says you're evicted and you're not allowed  
13 to have access.

14 Mr. Dondero believes that he gets to decide that Mr. Seery  
15 has no justification for making trades, even though he  
16 couldn't take the time to pick up the phone or otherwise  
17 inquire as to why Mr. Seery wanted to do that.

18 Mr. Seery -- Mr. Dondero believes that he is the arbiter  
19 and the decision-maker and gets to decide to stop trades,  
20 notwithstanding the TRO, notwithstanding the CLO agreements  
21 that he is not a party to, that his entities are not a party  
22 to.

23 Mr. Dondero thinks that he gets to decide that the Debtor  
24 has breached the agreements with the CLOs. He gets to decide  
25 that the Debtor is in default under those agreements. He gets

1 to decide that it's perfectly fine for Ellington and Leventon  
2 to support his interests while they have obvious duties of  
3 loyalty to the Debtor.

4 It is not right, Your Honor. It is not right. I stood  
5 here, I sat here, about four hours ago, five hours ago, and  
6 told the Court what the evidence was going to show, and it  
7 showed every single thing that I expected it to show and  
8 everything I just described for the Court about Mr. Dondero's  
9 belief that he's the decider.

10 He's not the decider, Your Honor. You are. And you made  
11 a decision on June -- on December 10th that he ignored.

12 There is ample evidence in the record to support the  
13 imposition of a preliminary injunction. And Your Honor, I'm  
14 putting everybody on notice now that we're amending our  
15 complaint momentarily to add all of the post-petition parties,  
16 because this has to stop. The threats have to stop. The  
17 interference has to stop. Mr. Dondero can always make a  
18 proposal if he thinks that there's something that will capture  
19 the imagination and the approval -- more importantly, the  
20 approval -- of the Debtor's creditors. We have no interest in  
21 stopping him from doing that. He's got very able and  
22 honorable counsel, and he can go to them and through them any  
23 time he wants.

24 But the record is crystal clear here that, notwithstanding  
25 Your Honor's order, one entered after serious deliberation, is

1 of no meaning to him. And we'll be back at the Court's  
2 convenience on the Debtor's motion to hold him in contempt.  
3 It'll just be a repeat of what we've heard today, because,  
4 frankly, the evidence is exactly the same.

5 With that, Your Honor, unless you have any questions, the  
6 Debtor rests.

7 THE COURT: All right. I do not.

8 Mr. Bonds?

9 MR. BONDS: Your Honor, we would like to divide our  
10 time between Mike Lynn and myself. Is that a problem?

11 THE COURT: That's fine. Go ahead.

12 MR. LYNN: Are we on mute?

13 MR. BONDS: No.

14 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

15 MR. LYNN: Your Honor, I'm taking a leaf out of Mr.  
16 Phelan's book. I happened to read the confirmation hearing in  
17 the *Acis* case regarding what was referred to as Clients A, B,  
18 and C. And Mr. Phelan, who testified, really gave an oral  
19 argument to the Court which was very persuasive and very  
20 thorough. So I'm going to sort of do the reverse, because I  
21 hope that the Court would find useful some information  
22 regarding the pot plan about which you've heard many words  
23 spoken but very little to do with what that plan was or how it  
24 came about.

25 The pot plan was proposed by Mr. Dondero for the first

1 time in September of 2020, shortly after the conclusion of the  
2 first round of mediations. Though there had been versions of  
3 it before, and lesser versions, the pot plan was finally in  
4 the form that would more or less survive it in September.  
5 Under the pot plan, Mr. Dondero proposed to come up with \$90  
6 million of cash and \$70 million in promissory notes, and that  
7 was to form a pot which creditors would share in.

8 The proposal was provided to the Debtor and then shared  
9 with the Committee. Mr. Seery responded with a degree, a  
10 degree only, of enthusiasm to the pot plan, and indeed  
11 provided a counter-term sheet to the pot plan. He also, so he  
12 said, and I believe him, approached the Committee and said  
13 this is a proposal to be taken seriously.

14 He proposed some improvements in his view to the pot plan.  
15 No response was received from the Creditors' Committee at that  
16 time.

17 After going back and forth with the Debtor -- and Mr.  
18 Seery, not unreasonably, was unwilling to propose the pot plan  
19 without some support on the Creditors' Committee -- I  
20 contacted Matt Clemente. We had a nice conversation. And at  
21 that time, Mr. Clemente raised two particular concerns. The  
22 \$160 million, which creditors did not think was enough, was  
23 not enough, in part, because that included no consideration  
24 for the acquisition of promissory notes executed some by Mr.  
25 Dondero and some by entities controlled by Mr. Dondero, which

1 notes total approximately \$90 million.

2 The second concern was that Mr. Dondero would get a  
3 release under the plan. During that call, I said the issue of  
4 the notes is subject to negotiation and might well result in a  
5 transfer of those notes, possibly with some amendments, to the  
6 pot, and that Mr. Dondero was prepared, in all likelihood, to  
7 forego a release.

8 Mr. Clemente agreed to get back to me. He did. And he  
9 said to me, I have talked to the Committee about this and they  
10 would like you to go to or they want you to go first to Mr.  
11 Seery, work off of his revised timesheet -- or term sheet,  
12 sorry -- and after you have reached an agreement with him,  
13 come to us, come to the Committee, and we'll negotiate with  
14 you.

15 Now, I might have agreed that that was a reasonable  
16 approach if there were a possibility that Mr. Seery would  
17 propose a plan without the agreement of creditors. But the  
18 way I took it was that the Committee was saying go make a deal  
19 with Seery and then we'll start negotiating, and we know,  
20 correctly, that Mr. Seery will not propose a plan that does  
21 not have our support.

22 So, effectively, we get to go through two rounds of  
23 negotiations, even though effectively everything that is in  
24 the estate, everything -- causes of action against Mr.  
25 Dondero, promissory notes from Mr. Dondero -- everything that

1 they would get under a plan or under a liquidation, they would  
2 get under the pot plan.

3 Now, I wanted you to know that, Your Honor, not because  
4 I'm now trying to get you or anyone else to sell the pot plan.  
5 But I think it's important that Your Honor know that Mr.  
6 Dondero's approach in this case has not been a hostile  
7 approach.

8 I know the Court had what it found to be an unsatisfactory  
9 experience with Mr. Dondero in the *Acis* case. But from the  
10 time I became involved in this case and Mr. Bonds became  
11 involved, we have been quiet, we have said nothing, and we've  
12 done virtually nothing in the case, up until the time after  
13 the mediation, when negotiations regarding a pot plan broke  
14 down.

15 Since that time, regrettably, there has been a good deal  
16 of hostility, and it's spreading. I would like to see it stop  
17 spreading. I will do what I can to make it stop spreading.  
18 But I need others to help me on that. And it's my hope that I  
19 can count on the Pachulski law firm, the Sidley law firm, and  
20 the firms representing the major creditors to help make that  
21 happen.

22 I do not think, and I would submit that it is not to the  
23 benefit of the estate, it is not to the likely workout of this  
24 case, that it would be best served by entering a preliminary  
25 injunction, which it appears to me prevents Mr. Dondero from



1 saying good morning to one of the employees of the Debtor that  
2 he knows.

3 It seems to me, Your Honor, that the injunction, by its  
4 terms, as Mr. Morris would have it, is an injunction that  
5 would prevent Mr. Dondero from discussing politics with Mr.  
6 Ellington. And it seems to me that an injunction that broad,  
7 that extensive, and one which lasts, as far as I can tell,  
8 until infinity, that such an injunction is not the right thing  
9 to do, given, if nothing else, the First Amendment to the  
10 United States Constitution.

11 That will conclude my presentation, and I will turn it  
12 over to the wiser and better-spoken colleague, John Bonds.  
13 Thank you, Your Honor.

14 THE COURT: Thank you. Mr. Bonds, what else do you  
15 have to say?

16 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

17 MR. BONDS: Your Honor, has the Debtor met the  
18 requirements for the issuance of a preliminary injunction? We  
19 submit that they have not. And the Fifth Circuit's rules are  
20 fairly clear as to the awarding of a preliminary injunction.

21 First, let's look at the type of preliminary injunction  
22 that the Debtor would like you to enter today. It provides  
23 that Mr. Dondero cannot talk to any employee, regardless of  
24 what is being communicated. Mr. Dondero can pass an employee  
25 on the street, but he can't acknowledge the employee, with

1 whom he may have worked for years. Nor can he talk to his  
2 personal assistants, again, which he has worked with for  
3 years. Does that violate the First Amendment of the  
4 Constitution?

5 What about the shared services agreement? What about the  
6 pot plan which he is advocating as a means of reorganizing the  
7 Debtor? Not the liquidation proposed by the Debtor. Can Mr.  
8 Dondero communicate with creditors about the pot plan and the  
9 other proposals without violating the TRO or the preliminary  
10 injunction which deals with interfering with the Debtor's  
11 business?

12 Your Honor, I think it's important to note that a  
13 preliminary injunction is an extraordinary remedy that may  
14 only be awarded upon a clear showing that the Plaintiff is  
15 entitled to such relief. Plaintiffs are entitled to a  
16 preliminary injunction if they show, one, a substantial  
17 likelihood that they will prevail on the merits of their  
18 claims; two, a substantial threat that they will suffer an  
19 irreparable injury if the injunction is not granted; three,  
20 their threatened injury outweighs the harm to the estate or  
21 the other party; and four, the public interest will not be  
22 disserved, misserved, if the preliminary injunction is  
23 granted.

24 The party seeking the preliminary injunction bears the  
25 burden of persuasion on all four requirements. We believe

1 that the Debtor today has failed to carry its burden of  
2 persuasion of proof with regard to the second element, which  
3 I'm going to refer to as the irreparable injury requirement.  
4 In order to show irreparable harm to the Court, the Plaintiff  
5 must prove that if the District Court denied the grant of a  
6 preliminary injunction, irreparable harm would be the result.  
7 Injuries are irreparable only when they cannot be undone  
8 through monetary remedies. There is no evidence before the  
9 Court today that Mr. Dondero cannot respond to any judgment  
10 that is rendered against him by this Court.

11 Your Honor, this preliminary injunction does not involve  
12 real property. Unlike the *Saldana* case, this request for the  
13 issuance of a preliminary injunction involves personal  
14 property only. The request that Mr. Dondero cease and desist  
15 all contact with employees is just wrong and may violate the  
16 First Amendment of the Constitution, as I previously stated.

17 We have other concerns regarding the issuance of a  
18 preliminary injunction. We feel that the preliminary  
19 injunction is too broad. It lacks a beginning and an end.  
20 When does the preliminary injunction terminate? What about  
21 the former employees? Once they are terminated, can Mr.  
22 Dondero speak to them? What about the pot plan? Is it gone  
23 forever? Can Mr. Dondero talk with the mediators about the  
24 pot plan? Can Mr. Dondero speak with the members of the  
25 U.C.C.?

1           It is easy to criticize Mr. Dondero. Did he violate the  
2 TRO? We submit that he didn't and the Debtor says that he  
3 did. What matters going forward is the lack of evidence of  
4 irreparable harm.

5           Mr. Seery sure wants to keep Mr. Dondero from talking to  
6 anyone in this case. Why is that? Does Mr. Seery believe  
7 that the only way to get his liquidation plan confirmed is to  
8 keep Mr. Dondero from talking to anyone? How will the  
9 preliminary injunction help the Debtor's creditors? Does  
10 keeping Mr. Dondero from talking with anyone mean that there  
11 will be a greater return to the creditor body? Does  
12 precluding Mr. Dondero from talking about his pot plan mean  
13 that the creditors will take home more money on their claims,  
14 or does it eliminate the possibility that they may take home  
15 more money on their claims?

16           Your Honor, what we are seeing here today is an attempt by  
17 a group to destroy what Mr. Dondero has built over the last  
18 few years. That isn't the way Chapter 11 should work.

19           Just one last thing to keep in mind, Your Honor. Mr.  
20 Seery's plan is a liquidation of the Debtor. Mr. Dondero's  
21 pot plan is a reorganization of the Debtor.

22           Thank you, Your Honor.

23           THE COURT: All right. Mr. Morris, you get the last  
24 word. Anything in rebuttal?

25           MR. MORRIS: I would just point out, Your Honor, that

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1 nobody here has objected to the Debtor's motion for the entry  
2 of a preliminary injunction except Mr. Dondero. While I  
3 appreciate that this is an adversary proceeding, anybody who  
4 felt strongly about the matter certainly could have moved to  
5 intervene. The Creditors' Committee could have moved to  
6 intervene. Mr. Clemente could have stood at the podium and  
7 begged Your Honor not to impose the injunction because he  
8 thought it was in the best interest of creditors to allow Mr.  
9 Dondero to interfere with the Debtor's business and to speak  
10 with their employees. Nobody has done that, Your Honor.  
11 Nobody's here speaking on behalf of Mr. Dondero. Nobody's  
12 here to testify on his behalf. Nobody's -- there's no  
13 evidence in the record that supports or corroborates anything  
14 that he said at all, Your Honor.

15 Unless Your Honor has any specific questions, the Debtor  
16 is prepared to rest.

17 THE COURT: All right. I do not have any follow-up  
18 questions.

19 All right. I have a lot to say. I'm sorry, I apologize  
20 in advance, but I've got a heck of a lot to say right now.  
21 I'm going to give you a ruling on the motion before me, but  
22 I've got a lot to add onto that, so I hope all the key parties  
23 in interest are listening carefully. Mr. Bonds, in the video,  
24 I can only see you. I hope Mr. Dondero is just right there  
25 out of the video camera view. Okay, there you are. I wanted

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1 to make sure you didn't wander off to take a bathroom break or  
2 anything. So, again, I have a whole lot to say here today.

3 First, I'm going to rule on the motion. The Court does  
4 find there is sufficient compelling evidence to grant a  
5 preliminary injunction that is completely consistent with the  
6 prior TRO. Okay? So, specifically, the Court today is going  
7 to continue to prevent Mr. Dondero from (a) communicating in  
8 any way, directly or indirectly, with any of the Debtor's  
9 board members -- I think that's really Strand board members --  
10 unless Mr. Dondero's counsel and counsel for the Debtor are  
11 included. Okay. I'm saying those words slowly and carefully.  
12 There is no bar on Mr. Dondero talking to the board about a  
13 pot plan or anything else in the universe Mr. Dondero wants to  
14 talk to them about. There's just a preclusion from him doing  
15 it without his counsel and the Debtor's counsel present.

16 Okay?

17 I did that before and I'm doing it now because I've seen  
18 concerning evidence that some communications to Mr. Seery and  
19 others had an intimidating tone, a threatening tone one or two  
20 times, an interfering tone. So, guess what, we're just going  
21 to have lawyers involved if any more conversations happen.

22 Okay.

23 So (b) the preliminary injunction, just as the TRO did, is  
24 going to prevent Mr. Dondero from making any threats of any  
25 nature against the Debtor or any of its directors, officers,

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1 employees, professionals, or agents. Okay. It's almost  
2 embarrassing having to say that or order that with regard to  
3 such an accomplished and sophisticated person, but, you know,  
4 I saw the evidence. I've got to do what I've got to do. You  
5 know, words in a text like, Don't do it, this is your last  
6 warning, and some of the other things, that has a threatening  
7 tone, so I'm going to order this.

8 Third, the preliminary injunction will prevent Mr. Dondero  
9 from communicating with any of the Debtor's employees except  
10 as it specifically relates to shared services provided to  
11 affiliates owned or controlled by Mr. Dondero.

12 Now, I'm going to elaborate in a couple of ways here. I  
13 think in closing argument there was a suggestion that he can't  
14 even talk to his friend, Mr. Ellington, about anything. Well,  
15 I heard today that Mr. Ellington and Mr. Leventon are no  
16 longer employees of the Debtor, so actually that's not an  
17 issue. But while this is very restrictive, while this  
18 prevents Mr. Dondero from engaging in small talk with Debtor  
19 employees about the weather or the football game or whatever,  
20 it's regrettable, but I feel like I'm forced to order this  
21 now, because, again, the communications that were put in the  
22 record. Okay? We just can't take any chances, as far as I'm  
23 concerned, with regard to there being potential interference  
24 with the Debtor's operations that might be harmful or contrary  
25 to creditors' interests.

1 Fourth, the preliminary injunction, just like the TRO,  
2 will prevent Mr. Dondero from interfering with or otherwise  
3 impeding the Debtor's business, including but not limited to  
4 the Debtor's decisions concerning its operations, management,  
5 treatment of claims, disposition of assets owned or controlled  
6 by the Debtor, and pursuit of any plan or alternative to the  
7 plan.

8 Now, I understand the argument that this is pretty broad  
9 and might be, I don't know, subject to some disputes regarding  
10 was it interference, did it impede the Debtor's business or  
11 not? You know what, if you follow the other prongs of the  
12 preliminary injunction, that you don't talk to the board  
13 without your counsel, Mr. Dondero, and the Debtor's counsel,  
14 and you don't talk to Debtor's employees except with regard to  
15 matters pertaining to the shared services agreement, and,  
16 bottom line, if you just run everything by your attorneys,  
17 you'll be okay. We won't have this ambiguous, vague,  
18 problematic territory.

19 Fifth, I will go ahead and, for good measure, belts and  
20 suspenders, whatever you want to call it, prevent Mr. Dondero  
21 from otherwise violating Section 362(a) of the Bankruptcy  
22 Code.

23 Now, I read the response filed at 9:30 last night by Mr.  
24 Dondero's counsel. It's a good response. It makes legal  
25 arguments about that being, you know, it just being too vague.



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1 Well, to the contrary, it just restates what's already in the  
2 Bankruptcy Code, right? Persons are prohibited from violating  
3 Section 362(a) of the Bankruptcy Code. If anything, it's the  
4 sky is blue, right, just stating what is true. But I  
5 understand Debtor wanting some clarity in an order, because we  
6 want you to take this seriously, Mr. Dondero, and not just do  
7 something and then say, well, you didn't know what was in the  
8 Code. You know, you need to consult with your lawyer. That's  
9 going to be in there.

10 Bottom line, I want that language in there because, Mr.  
11 Dondero, I want you to see an order that this Court expects  
12 you to comply with the Bankruptcy Code. And again, if you  
13 don't understand, if you're unsure whether you can take action  
14 x or y, consult with your very capable lawyers.

15 I note that if you listened carefully to these words,  
16 there was nothing in here that stopped Mr. Dondero from  
17 talking to the Creditors' Committee about a pot plan. Nothing  
18 in this injunction, nothing in the previous TRO, ever  
19 prohibited that.

20 Last, with regard to the ruling -- and again, I've got a  
21 lot more to say when I'm done -- I am going to further enjoin  
22 Mr. Dondero from what we said in the TRO: causing,  
23 encouraging, or conspiring with any entity controlled by him  
24 and/or any person or entity acting on his behalf from directly  
25 or indirectly engaging in any of the aforementioned items.

1 This is not an injunction as to nonparties to the adversary  
2 proceeding. It is an injunction as to Mr. Dondero from doing  
3 the various enjoined acts that I previously listed under the  
4 guise of another entity or a person that he controls.

5 Again, if you're dealing with and through your attorneys,  
6 Mr. Dondero, I don't think this will be hard to maneuver.

7 I guess I'm actually not through with my ruling yet. I do  
8 want to add that the Court rules that the injunction shall  
9 last through the time of confirmation of a plan in this case  
10 unless otherwise ordered by this Court.

11 And as to the legal standards, I want to be clear for the  
12 record that the Court believes this injunction is necessary to  
13 avoid immediate and irreparable harm to the Debtor's estate  
14 and to its reorganization prospects. I believe that there's a  
15 strong likelihood the Debtor will succeed in a trial on the  
16 merits of this adversary proceeding. I believe the public  
17 interest strongly favors this injunction. And I believe the  
18 balance of harms weighs in favor of the Debtor on all of these  
19 various issues.

20 Again, I want to reiterate, the intimidation and  
21 interference that came through in some of these email and text  
22 communications was concerning to the Court and is a motivation  
23 for this preliminary injunction.

24 Now, I'm going to add on a couple of things today. The  
25 first thing I'm going to add on -- and I want this, Mr.

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1 Morris, in the order you submit. You didn't ask me for this,  
2 but I'm going to do it. I'm going to order you, Mr. Dondero,  
3 to attend all future hearings in this bankruptcy case unless  
4 and until this Court orders otherwise. And I'm doing this --  
5 it's not really that unusual a thing for me to do. I  
6 sometimes order this in cases when I'm concerned about, you  
7 know, is the businessperson paying attention to what's going  
8 on in the case and is he engaged, is he invested, is he  
9 available when we need him?

10 In this case in particular, the evidence was that you  
11 didn't read the TRO. You were not aware of its basic terms  
12 and you didn't read it. Okay? So that was what sent me over  
13 the edge as far as requiring this new element that you're  
14 going to attend every hearing. Obviously, we're doing video  
15 court, so that's not that much of a burden or imposition. You  
16 can pretty much be anywhere in the world and patch in by  
17 video, since we're in the pandemic and not doing live court.  
18 But I think it's necessary so I know you hear what I rule and  
19 what goes on in this case.

20 I will tell you that I was having a real hard time during  
21 your testimony deciding if I believe you didn't read the TRO  
22 or know about the different things that were prohibited. You  
23 know, I was thinking maybe you're not being candid to help  
24 yourself in a future contempt hearing, or actually maybe  
25 you're being a hundred percent honest and candid but you're

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1 kind of hiding behind your lawyers so that you can argue the  
2 old plausible deniability when it suits you.

3 But no more. No more. I'm not going to risk this  
4 situation again of you not knowing what's in an order that  
5 affects you. So you must be in court by video until I order  
6 otherwise.

7 Second, and I regret having to do this, but I want it  
8 explicit in the preliminary injunction that Mr. Dondero shall  
9 not enter Highland Capital Management's offices, regardless of  
10 whether there are subleases or agreements of Highland  
11 affiliates or Dondero-controlled entities to occupy the  
12 office, unless Mr. Dondero has explicit written permission  
13 that comes from Highland's bankruptcy counsel to Dondero's  
14 bankruptcy counsel. Okay? If he does, it will be regarded as  
15 trespassing.

16 And, I don't know, are there security guards on the  
17 premises? I mean, gosh, I hate to be getting into this  
18 minutia, but -- well, I just want it explicit in the order  
19 that Mr. Dondero, I'm sorry, but you can't go to these offices  
20 without written permission. And again, that can only be given  
21 from Debtor's counsel to Mr. Dondero's counsel. Okay? So  
22 it's going to be trespassing. You know, someone can call the  
23 Dallas Police Department and have you escorted out. Again, I  
24 hate having to do that. It's just, it's embarrassing for me.  
25 I think it's embarrassing for everyone. But I'm backed up in

1 that corner.

2 Next, I am going to ask that it be clear that Mr. Dondero  
3 can deal with the Unsecured Creditors' Committee and its  
4 professionals with regard to talking about a pot plan.

5 And next, I'm going to add -- and I think, Mr. Morris, you  
6 requested this at some point today in oral argument -- Mr.  
7 Ellington and Mr. Leventon shall not share any confidential  
8 information that they received as general counsel, assistant  
9 general counsel for the Debtor, without Debtor's counsel's  
10 explicit written permission. Okay? So we've got that in  
11 writing.

12 And, you know, that's a little awkward because they're not  
13 here, they weren't parties to the injunction, but they were  
14 Debtor employees until recently. If they want to risk  
15 violating that and come back to the Court and argue about  
16 whether they got notice and whatnot of that, they can argue  
17 that, but I want it in the order regardless.

18 So that is the ruling. And now I want to kind of talk  
19 about a few other things. And before we're done here, Mr.  
20 Morris, I'll ask do you have questions, does Mr. Bonds have  
21 questions, does anyone have questions about the ruling. But I  
22 want to talk about a couple of things. And again, I hope that  
23 I'm coming through loud and clear, Mr. Bonds, in your office  
24 for Mr. Dondero to hear this. It's really, really important  
25 that he heard what I'm about to say. I'm going to say some

1 kind of unpleasant things and then I'm going to say some  
2 hopeful things, okay?

3 Mr. Dondero? Okay. Mr. Dondero, I'm going to -- Mr.  
4 Morris, you've got your hands on your head. Did I miss  
5 something?

6 MR. MORRIS: No. I was just surprised to see Mr.  
7 Dondero on his phone. I apologize, Your Honor.

8 THE COURT: Oh, my goodness. Were you on your phone,  
9 Mr. Dondero?

10 MR. DONDERO: No, I was not.

11 THE COURT: Okay. I want you to listen to this  
12 really closely, and then I promise I'm going to have something  
13 hopeful to say after this very unpleasant stuff. You know, I  
14 keep a whiteboard up at my bench. I don't know if you can  
15 read it. But sometimes I hear something in a hearing and I  
16 think, okay, this is one of my major takeaways from what I  
17 heard today. And I've got two, I've got two big takeaways  
18 here. Number one on my whiteboard is Dondero's spoliated  
19 evidence. Game-changer for all future litigation. Okay.

20 MR. DONDERO: I'm sorry. I didn't hear that. I  
21 didn't hear that. Could you repeat that, please?

22 THE COURT: Mr. Dondero, spoliated evidence, game-  
23 changer in future litigation.

24 Okay. Let me tell you, the throwing away of the phone,  
25 that was the worst thing I heard all day. That was far and

1 away the worst thing I heard all today. I don't know what I'm  
2 going to hear down the road to fix this, but if it's really  
3 gone, let me tell you how bad this is. We have all sorts of  
4 Federal Rules of Civil Procedure that talk about this being a  
5 bad thing, but I wrote an opinion a couple years ago dealing  
6 with spoliation of electronic evidence, and I think it might  
7 be helpful for everyone to read. It was called *In re Correra*,  
8 C-O-R-R-E-R-A. I have no idea what the cite on it is. But in  
9 this case, *Correra*, we had a debtor who had a laptop, and he  
10 gave the laptop to his personal assistant, who took it away to  
11 another state. And at some point during the case, parties  
12 discovered, oh, there's a laptop that may have a treasure  
13 trove of information. Who knows? Maybe it does; maybe it  
14 doesn't. But there's a laptop that we just now learned about  
15 that the personal assistant has.

16 And so I issued an order that she turn it over, and there  
17 were subpoenas and depositions, blah, blah, blah. Long story  
18 short, the evidence ended up being that she deleted everything  
19 on the laptop, and then -- this would almost be funny if it  
20 wasn't so serious -- she downloaded thousands of pictures of  
21 cats onto the laptop. I kid you not, cats. Meow, meow, cats.  
22 And she downloaded a hundred-something full-length movies.  
23 And we had two days of forensic experts come in and take the  
24 witness stand and tell me about how, okay, this is like an  
25 amateurish -- you've talked about amateur hour today -- this

1 is kind of an amateurish way of deleting data, right. You  
2 first delete all the files on the laptop and then you cover  
3 over all the space to make sure the information is not  
4 retrievable. You know, this genius ended up retrieving some  
5 of the information.

6 But the long story short is I sanctioned the debtor and  
7 his assistant jointly and severally. You'll have to go back  
8 and look at the opinion. I'm pretty sure it was over a  
9 million dollars. And I can't remember if that was attorneys'  
10 fee-shifting only, or monetary, like penalty on top of the  
11 attorneys' fees-shifting. I just can't remember. But maybe  
12 poor Tara needs to be advised of that opinion, too. I mean,  
13 --

14 But the other reason I put game-changer in future  
15 litigation is, in my *Correra* case, it wasn't just the monetary  
16 million-dollar sanction or whatever it was; it was a game-  
17 changer in future litigation because the adverse party to the  
18 debtor ended up arguing -- and it was the state of New Mexico,  
19 by the way -- they ended up saying, in all future litigation,  
20 we want you -- some adversaries, we want you to make an  
21 adverse inference. In other words, for all of these elements  
22 that we're trying to prove in our fraudulent transfer  
23 litigation and whatever else was going on, we want you to make  
24 an adverse inference that there would have been evidence there  
25 on that laptop that would have supported some of our causes of



1 action and it was destroyed to keep us from having that  
2 evidence.

3 And they brought forth all kinds of case law. It's a hard  
4 area. It's a really, really hard area. But I ended up --  
5 again, it's not in the main opinion. It was in subsequent  
6 orders. I ended up saying, yeah, I think you've met the  
7 standard here to draw adverse inferences.

8 So, again, this is a very unpleasant message for me to  
9 deliver today. But the destruction of the phone is my biggest  
10 takeaway of concern today, how that might have ramifications.  
11 You know, there are other bad things, too, about that. I'm  
12 not even going to go there right now. But the, you know,  
13 Title 18, you can ask your lawyer what that means, but okay.

14 My second big takeaway before we get to the hopeful stuff  
15 is -- and this is kind of harsh, what I'm about to say -- but  
16 Ellington and Leventon maybe care more about you, Mr. Dondero,  
17 than their law license. You know, I guess it's great to have  
18 people in your life who are very, very loyal to you. I mean,  
19 loyalty is a wonderful thing. But I am just so worried about  
20 things I've heard. Again, the phone and in-house lawyers.  
21 The biggest concerns in my brains right now. I have worried  
22 about them for a while.

23 You all will -- well, Mr. Dondero, you might not know  
24 this. But we had a hearing a few months ago, maybe September,  
25 October, where the Creditors' Committee was trying to get

1 discovery of documents. And we had some sort of hearing,  
2 maybe a motion to compel production. And we had many, many  
3 entities that you control file objections: NexPoint, NexBank.  
4 I can't even remember. We just had a whole slew. CLO Holdco.  
5 Many, many of these entities objected. And I was trying to  
6 figure out that day who was instructing them. And oh my  
7 goodness, I hope the in-house layers are not involved in this  
8 document discovery dispute, because, you know, they have  
9 fiduciary duties. And are -- you know, is it -- it feels like  
10 it's breaching a duty to the bankruptcy estate when it's in  
11 the bankruptcy estate's best interest to get these documents  
12 if you're meanwhile hiring lawyers for these other entities,  
13 Holdco, et cetera, and saying, Fight this.

14 I never really pressed it very hard back then, but I  
15 raised the issue and I said, I'm really, really concerned  
16 about this. And I continue to be concerned about it. I had  
17 experiences with Mr. Ellington in the Acis case where he  
18 testified on the witness stand, and later it looked a heck of  
19 a lot like he might have committed perjury. I hate to use  
20 such blunt terms. But I let it go. I'm just like, you know,  
21 I'm not going to -- you know, I'm going to just hope for the  
22 best that he misspoke.

23 But I'm getting a really bad taste in my mouth about  
24 Ellington and Leventon, and I hope that they will be careful  
25 and you will be careful, Mr. Dondero, in future actions.

1           Is Mr. -- I can't see Mr. Dondero. I want to make sure  
2 he's not on the phone. Okay. Okay. Thank you.

3           So where was I going to head next? I guess I want to say  
4 a couple of things now that I would describe as a little bit  
5 more hopeful, and that is pertaining to this whole pot plan  
6 thing.

7           You know, I tend to think, without knowing what's being  
8 said outside the courtroom, that a pot plan would be the best  
9 of all worlds, okay, because the plan that we have set for  
10 confirmation next week, I understand we have a lot of  
11 objections, and if I approve it, if I confirm the plan, we're  
12 going to have a lot of appeals and motions for stay pending  
13 appeal, and no matter how that turns out, we're going to have  
14 a lot of litigation. Okay? You know, we're going to have  
15 adversaries. And we have a not-very-workable situation here  
16 where we have these Dondero-controlled affiliates questioning  
17 Mr. Seery's every move.

18           I would love to have a pot plan that would involve, Mr.  
19 Dondero, you getting to keep your baby, okay? I acknowledge,  
20 everyone here acknowledges, you are the founder of this  
21 company. This is your baby. You created a multi-billion-  
22 dollar empire, okay? I would be shocked if you didn't want to  
23 keep your baby. Okay? If there was a reasonable pot plan, I  
24 would love it.

25           But I'm telling you, the numbers I heard didn't impress me

1 a heck of a lot. I'm not an economic stakeholder. It's not  
2 my claim that would be getting paid. But I can see where  
3 these Creditor Committee members, they're not going to think  
4 \$160 million -- \$90 million in cash, \$70 million in notes, or  
5 vive-versa -- is nearly enough. Okay?

6 So I am going -- what just happened? What just happened?  
7 I lost Mr. Dondero. Okay. This is getting kind of humorous,  
8 almost.

9 Okay. I am going to order that between now and the end of  
10 the day Tuesday there be good-faith, and I'll say face-to-face  
11 -- Zoom, WebEx, whatever -- negotiations between Mr. Dondero  
12 and his counsel and at least the Committee and its  
13 professionals regarding this pot plan.

14 Now, the train is leaving the station next Wednesday,  
15 okay? If we don't have Creditors' Committee and Debtor and  
16 Dondero rushing in here saying, Please continue the  
17 confirmation hearing next Wednesday, if we don't have like  
18 unanimous sentiment to do that, you know, this is a 15-month-  
19 old case, I'm going to go forward with the plan that's on  
20 file.

21 And it's been a long, expensive case. I had great  
22 mediators try to give it their best shot to get a grand  
23 compromise. I just, I'm not going to drag this out unless you  
24 all tell me Wednesday morning, We want you to continue this a  
25 week or two.

1 And let me tell you -- this may be the stars lining up, or  
2 it may not be -- I was supposed to have a seven-day trial  
3 starting the week after next, and then I was supposed to have  
4 a four- or five-day day trial starting immediately after that.  
5 And all of those lawyers came in and asked for a continuance  
6 because of COVID. They wanted a face-to-face trial, and so  
7 I've put them off until April.

8 So if you wanted to postpone the confirmation hearing to  
9 the following week or even the following week, I have the gift  
10 of time to give you. But I'm not going to do it lightly.  
11 I'm, again, I'm just going to order face-to-face meetings.  
12 And I said Dondero and his counsel and the Committee and its  
13 professionals. You know, if -- I'm not slighting the Debtor  
14 here or Mr. Seery, but I'm kind of taking a cue from what Mr.  
15 Morris, I think I heard you say, that at this point it's the  
16 Committee, it's the Committee's money, and I think that's the  
17 starting place. And if they want to join the Debtor in at the  
18 beginning or midway through, you know, wonderful, but I think  
19 it needs --

20 MR. POMERANTZ: Your Honor, this is Jeff -- this is  
21 Jeff Pomerantz. I hate to interrupt, and I never do that to a  
22 judge, but I did have something to say in my comments about a  
23 continuance that we've talked about with the Committee and  
24 some other developments in the case.

25 THE COURT: Oh.

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1 MR. POMERANTZ: I'm happy to wait. But it has -- it  
2 has nothing to do with the comments you said, although, as I  
3 think you've heard from me before, the Debtor has been a  
4 supporter, a supporter of a pot plan. Mr. Seery has done a  
5 tremendous amount of work working with Mr. Dondero, working  
6 with Mr. Lynn, to try to make that happen. And if the  
7 Committee is willing to engage in a pot plan, we would  
8 definitely support that. Because we do agree with Your Honor  
9 that, absent a pot plan, we are looking at a lot of  
10 litigation.

11 Some of the issues you're going to have to deal with at  
12 the confirmation hearing if we do not have a peace-in-the-  
13 valley settlement is exculpations, releases, moratoriums on  
14 litigation, extensions of your January 9th order --

15 THE COURT: Uh-huh.

16 MR. POMERANTZ: -- with respect to pursuing certain  
17 people.

18 So, we get it, and we've gotten it from the beginning.  
19 And Mr. Seery, sometimes even at a fault, has been  
20 singlehandedly focused on trying to get that done. It's just  
21 unfortunate where we are here.

22 But having said that, I wanted to first apprise the Court  
23 of a recent major development in the case. I'm pleased to  
24 report that the Debtor and UBS have reached a settlement in  
25 principle which will resolve all of UBS's claims against the

1 estate, all of UBS's claims against Multi-Strat. The parties  
2 are working on documentation. The settlement is subject to  
3 internal approvals from UBS, but we've been led to believe  
4 those approvals will occur, and we would hope to file a Rule  
5 9019 motion in the near future.

6 I'm sure Your Honor is quite pleased to hear that. The  
7 UBS matters have taken a substantial amount of time. And with  
8 the settlement of UBS's claims, the only material unresolved  
9 claim, unrelated to Mr. Dondero or the employees, are Mr.  
10 Daugherty. And Mr. Seery will continue to work with Mr.  
11 Daugherty to try to settle that.

12 THE COURT: Okay.

13 MR. POMERANTZ: With respect to the scheduling, with  
14 respect to the scheduling, Your Honor, there are three  
15 significant matters on for hearing on the 13th. The first is  
16 the Debtor's motion to approve a settlement with HarbourVest,  
17 which Mr. Dondero is contesting. Depositions are being  
18 conducted on Monday, and we anticipate an evidentiary hearing  
19 in connection therewith.

20 The Debtors, as Mr. Morris indicated earlier on in the  
21 hearing, have also filed a complaint and a motion for a  
22 temporary restraining order against certain of the Advisors  
23 and Funds owned and controlled by Mr. Dondero which relate to  
24 the CLO management agreements for which Your Honor has heard a  
25 lot of testimony today. We also expect that TRO to be

1 contested and for the Court to have an evidentiary hearing.

2 And as Your Honor mentioned, the confirmation of the plan  
3 was scheduled for Wednesday, and there were 15 objections. I  
4 would point out, Your Honor, all but four of which were Mr.  
5 Dondero, his related entities that he owns or controls, and  
6 employees or former employees.

7 The Court previously gave us time on the 13th and the  
8 14th, I think anticipating that we would have a lot and it may  
9 be necessary to go into two days. However, Your Honor, those  
10 two days are not going to be enough to deal with all the  
11 issues that we have before Your Honor.

12 So what we suggest, and we've spoken to the Committee and  
13 the Committee is supportive, that we continue confirmation to  
14 a day around January 27th. This will enable the Debtor to not  
15 only -- and the Committee -- not only to take Your Honor up on  
16 what you'd like to see accomplished in the next few days. I'm  
17 sure the Debtor is supportive and will be supportive, and we  
18 hope the Committee will engage in good-faith negotiations, and  
19 if there's a way to do a pot plan, we are all for it. It'll  
20 give time for that to happen.

21 But at the same time, and I think what you'll hear from  
22 Mr. Clemente, that we're willing to give a continuance, we all  
23 know that if there is not a settlement to be had, if there is  
24 not a pot plan to be had, this case has to confirm, it has to  
25 exit bankruptcy, and at least from the Debtor's perspective, a



1 lot of protections will have to be in place that basically  
2 this has not just been a pit stop in Bankruptcy Court and we  
3 return to the litigation ways that Highland is involved in.

4 So, Your Honor, we believe that the two evidentiary  
5 hearings on for next week probably will fill up both days. We  
6 would suggest that the first day be the complaint and the TRO  
7 against the Advisors and the Funds for the 13th, and the 14th  
8 be the HarbourVest.

9 We also recognized as we were preparing for today, Your  
10 Honor, looking ahead, that we thought it was not fair for us,  
11 although we know Your Honor works tirelessly and as hard as  
12 anyone on this hearing and that Your Honor would be prepared  
13 for confirmation and would be prepared for each of those  
14 trials, given the gravity of these issues, the extensive  
15 pleadings, pleadings that you would get in confirmation on  
16 Monday from the Debtor, that it made sense to continue the  
17 hearing.

18 So, again, fully supportive of Your Honor's mandate to try  
19 to see if we could work things out, fully supportive of a  
20 continuance until the 27th, if that date works for Your Honor,  
21 but we believe we do need to go ahead with the two matters  
22 that are on for calendar next week.

23 MR. RUKAVINA: Your Honor, this is Davor Rukavina.  
24 May I be heard briefly?

25 THE COURT: Oh my goodness. Who do you represent,

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1 Mr. Rukavina?

2 MR. RUKAVINA: And I apologize -- Your Honor, I am  
3 the new counsel who will be representing the Funds and  
4 Advisors. I will probably be taking the laboring oar at  
5 confirmation.

6 I apologize I'm not wearing a suit and tie. I did not  
7 anticipate speaking right now.

8 I support -- to the extent that that's an oral motion for  
9 continuance by Mr. Pomerantz, I certainly support that. I  
10 would suggest that the Court give us an understanding of that  
11 today, because we do have depositions and discovery lined up  
12 which we can then push if the hearing on confirmation is  
13 pushed to the 27th. And we have no problem going forward on  
14 the other matters on the 13th.

15 So, I am co-counsel to K&L Gates, Your Honor, so whoever  
16 the K&L Clients are, they're now my clients as well. I just  
17 wanted to be heard briefly that we support the recommendation  
18 by Mr. Pomerantz and just urge that the Court give us finality  
19 on that issue today so that we're not burning the midnight  
20 oil, many sets of lawyers preparing for confirmation on the  
21 13th.

22 Thank you for hearing me, Your Honor.

23 THE COURT: All right. So, just to be clear, the  
24 proposal is that we go forward next Wednesday on the newest  
25 request for a TRO with regard to -- is -- the CLO Funds and

1 the Advisors. I'm forgetting the exact names. And then that  
2 would take likely the whole day, but whether it does or does  
3 not, we would roll over to Wednesday of next week -- that'd be  
4 the 14th -- to do the HarbourVest. It's a compromise motion,  
5 right? Is there anything else?

6 MR. POMERANTZ: No, correct, it's the compromise  
7 motion, Your Honor. There are two pending objections on this  
8 and discovery scheduled for Monday.

9 THE COURT: All right. Well, as far as --

10 MR. CLEMENTE: Your Honor?

11 THE COURT: Yes, who is that?

12 MR. CLEMENTE: Oh, Your Honor, it's Matt Clemente at  
13 Sidley on behalf of the Committee. I'm here, and I thought  
14 maybe I'd offer just a couple of comments at this point, but  
15 I'm happy to hold them.

16 THE COURT: Well, --

17 MS. SMITH: And Your Honor, this is Frances Smith. I  
18 would also like to be heard before you wrap up.

19 THE COURT: Okay. Well, I guess generally I want to  
20 know, does anyone have any objection -- I can't imagine they  
21 would -- but any objection to pushing confirmation out to  
22 around the 27th? I'm going to say that because I have an  
23 issue middle of the day the 28th. If we do it the 27th, I  
24 could only go a day and a half, okay? I have to go out of  
25 town the evening of the 28th, and I would be out the 29th as

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1 well. That's Thursday and Friday. So we'll talk about that.  
2 But anyone, Mr. Clemente or anyone else, want to say anything  
3 about continuing the confirmation?

4 MR. CLEMENTE: Your Honor, it's Matt Clemente at  
5 Sidley. No, Your Honor, we're supportive of that schedule.

6 And Your Honor, just briefly, I heard my name discussed  
7 quite a bit at this hearing as well as the Committee. I'm not  
8 going to get into it unless Your Honor would like me to, but  
9 let me be very clear: The committee has taken very seriously  
10 the pot plan proposals that Mr. Dondero has presented, and  
11 there's much more to the discussion other than what Mr. Lynn  
12 suggested in his remarks.

13 So I'm not going to get into all that unless Your Honor  
14 thinks it's necessary. I think it's of no moment here. But I  
15 did want Your Honor to know that we have carefully considered  
16 the pot plan proposals and have communicated a variety of  
17 issues about that to Mr. Lynn and will continue to take the  
18 direction of Your Honor and engage on a pot plan, Your Honor.  
19 But I did not want there to be any suggestion that we did not  
20 take it seriously and that there was much, much more  
21 consideration and discussion about it than what was suggested.

22 THE COURT: Uh-huh.

23 MR. CLEMENTE: Thank you, Your Honor.

24 THE COURT: All right.

25 MS. SMITH: Your Honor, this is Frances Smith.

1 THE COURT: Who do you represent, Ms. Smith?

2 MS. SMITH: Your Honor, we were recently retained by  
3 the four senior employees: Tom Surgent, Frank Waterhouse,  
4 Scott Ellington, Isaac Leventon, along with Baker & McKenzie,  
5 and I believe we have the Baker & McKenzie lawyers Deb  
6 Dandeneau and Michelle Hartmann on the line.

7 Your Honor, we have listened to the whole hearing. And I  
8 was not going to make an appearance. I was following your  
9 instructions and listening carefully. But Your Honor, I --  
10 first of all, we hate to be before you for the first time in a  
11 discovery dispute. We did file a very limited objection to  
12 the plan because of the disparate treatment of our clients,  
13 which we are not arguing today, of course. We received -- it  
14 is our usual practice, Your Honor -- you've known me for a  
15 long time -- to cooperate on having witnesses appear. We got  
16 -- we were notified very late Tuesday that the Debtor's  
17 counsel would like two of our clients to appear. We made what  
18 we thought was a reasonable request for a copy of the  
19 transcript from the deposition. We were invited to the  
20 deposition and then told we could not attend, or our clients  
21 could not attend. When we offered to make it lawyers-only,  
22 they said no. So we did not produce our clients without a  
23 subpoena.

24 Our clients have not been evading service. As far as we  
25 know, they were each attempted service one time, late

1 Wednesday, when they were -- around dinnertime. Mr. Leventon  
2 was home all day today. Didn't go any -- or yesterday.  
3 Didn't go anywhere. Was not served. Wasn't served this  
4 morning. The same, as far as we know, with Mr. Ellenton.

5 Your Honor, on the order that you just entered, I am a  
6 little unclear of where your findings of fact stopped. First  
7 of all, I do not think that you can enjoin Mr. Ellenton and  
8 Mr. Leventon. They are not parties to the adversary  
9 proceeding.

10 You know, we did some very quick research. There's a  
11 Seventh Circuit case, a district court may not enjoin  
12 nonparties who are not either acting in concert with an  
13 enjoined party nor in the capacity of agents, employees,  
14 officers of the enjoined party. Mr. Ellington and Mr.  
15 Leventon are not agents, employees, officers of Mr. Dondero.  
16 So I think that, Your Honor, you cannot make that ruling.

17 Of course, you can rule that Mr. Dondero cannot talk to  
18 Mr. Leventon and Mr. Ellington. That might be a way to fix  
19 that one part. But as nonparties, I don't believe that you  
20 can enjoin them.

21 Also, Your Honor, there was just no evidence against them  
22 to support that. Out of more than two dozen exhibits, there  
23 was one mention of Mr. Leventon, where all he did was give Mr.  
24 Dondero Matt Clemente's phone number. And you yourself ruled,  
25 Your Honor, that Mr. Dondero could speak with the Committee,

1 so that wouldn't even have been a violation of your orders.  
2 There's three related to Mr. Ellington, but no evidence of  
3 confidential information.

4 And, Your Honor, I'm very concerned about the comments  
5 that you made about Mr. Ellington and perjury. I just want to  
6 make sure that it's clear on the record that those were not  
7 findings of fact. That did not -- there was no evidence about  
8 that today. And I understand Your Honor's frustration. I was  
9 -- but I just want to be very clear on the record that those  
10 were not findings of fact that you were making during that  
11 part of your comments. I was a little unclear about where the  
12 ruling exactly stopped when you said you wanted to add onto  
13 the order and then you were going to make a few more comments.

14 So that's all I have, Your Honor.

15 THE COURT: Okay.

16 MS. SMITH: Thank you for listening and --

17 THE COURT: Thank you. Fair comments, one and all.

18 I'm first going to tweak. I was concerned. You heard me  
19 express concern about, you know, Ellington and Leventon aren't  
20 parties to this adversary. Not here. So here's -- Mr.  
21 Morris, I assume you're the scrivener. Let's change what I  
22 said earlier and have the injunction read that Mr. Dondero  
23 shall not request that Mr. Ellington or Mr. Leventon share any  
24 confidential information they received as general counsel or  
25 assistant general counsel for the Debtor without Debtor's

1 counsel's explicit written permission, nor accept any  
2 confidential information that the two of them may have  
3 received as general counsel or assistant general counsel for  
4 the Debtor. Okay? So the injunction is --

5 MR. MORRIS: Your Honor, if I may, --

6 THE COURT: Who?

7 MR. MORRIS: Your Honor, if I may, that is not  
8 sufficient for us, because that means that they can actually  
9 share it with him as long as he doesn't request it. I'm a  
10 little surprised --

11 THE COURT: No. You didn't hear the accept -- the  
12 last part.

13 MR. MORRIS: Okay.

14 THE COURT: I added on at the end, nor shall Mr.  
15 Dondero accept any confidential information. They -- he shall  
16 not request that they share it, nor shall he accept it. Okay?  
17 I --

18 MR. MORRIS: So, but that -- my concern is that that  
19 makes Mr. Dondero the arbiter of what's confidential and  
20 what's privileged. And I think that's improper. I think it's  
21 really reasonable, and I'm surprised -- you know, we're all  
22 advocates here, so I take no issue with counsel, but the order  
23 was going to be pretty simple: Don't disclose privileged or  
24 confidential information. If they don't like that, that's  
25 fine. Just bar Mr. Dondero from speaking to either one of



1     them, period, full stop. Because we should not be in a  
2     position where he doesn't request it but somehow they send it  
3     to him. It is confidential.

4             I mean, who's deciding what's confidential here? Mr.  
5     Ellington? Mr. Leventon? Mr. Dondero? Just stop their  
6     communication. Mr. Dondero is subject to the Court's order.  
7     He's the one who's subject to this motion. Bar him from  
8     speaking to either one of them. It's a very -- very simple  
9     solution.

10            MR. BONDS: Your Honor, I agree that it's a simple  
11     solution. It's, I mean, not correct to assume that Mr.  
12     Dondero is in any way going to breach his obligations to the  
13     Court or to Mr. Ellington and Mr. Leventon. I don't see where  
14     -- what we're talking about.

15            MS. SMITH: Also, Your Honor, I have to object to him  
16     disparaging my clients that way. There's been no evidence  
17     that they improperly shared any information. They are  
18     licensed lawyers and they know the Rules of Professional --  
19     they know the rules of professionalism, so --

20            THE COURT: Okay. I, you know, I didn't make a  
21     finding earlier when I held out my two giant takeaways, to get  
22     to your later question, no findings. But I really hope you  
23     share with them everything I said, the concerns I expressed.  
24     Maybe get the transcript.

25            MS. SMITH: Absolutely, Your Honor.

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1 THE COURT: Because I have huge concerns about  
2 conflicts of interest here. Okay? Huge, huge concerns. I  
3 had them back when we had the discovery fight, Committee  
4 wanting documents, and, you know, and I still have them. You  
5 know, did Ellington know about the TRO?

6 MS. SMITH: Understood, Your Honor.

7 THE COURT: Okay. So let me backtrack. We already  
8 had a TRO that prevented Mr. Dondero from talking to any  
9 employees of the Debtor unless it was about shared services  
10 agreement.

11 So, Mr. Bonds, I'm going to flip it back to you on this  
12 one. Why shouldn't I at this point just say, okay, guess  
13 what, no talking to Mr. Leventon or Ellington for the time  
14 being? Why --

15 MR. BONDS: First of all, --

16 MS. SMITH: Your Honor, that's acceptable to us.

17 THE COURT: Okay. What's wrong with that, Mr. Bonds?

18 MR. BONDS: Your Honor, we don't believe that Mr.  
19 Dondero has violated the TRO.

20 And secondly and more importantly, we don't believe that  
21 there's any way that you can enter an order that singles out  
22 two former employees. I mean, that's bizarre.

23 THE COURT: If I'm concerned that it's thwarting the  
24 reorganization efforts and there are conflicts of interest  
25 here, why can't I?

1           You know, this is -- I hate to say it, but I feel like  
2 I've been in the role of a divorce judge today. We have very  
3 much a corporate divorce that has been in the works, unless we  
4 get this pot plan on track, okay, and I'm a judge having to  
5 enter interim orders keeping one spouse away from the other,  
6 keeping one spouse out of the house, keeping one spouse away  
7 from the kids. It's not pleasant at all. But I don't -- the  
8 more I think about it, the more I have authority to do it just  
9 to protect, to protect the nest egg here.

10           MS. SMITH: Your Honor, we are perfectly fine with  
11 you enjoining Mr. Dondero from speaking to our clients, and we  
12 will convey that to our clients.

13           THE COURT: Okay. Mr. Bonds, I can't hear you.

14           MR. BONDS: I'm sorry, Your Honor. What evidence is  
15 there of irreparable harm as to Mr. Dondero talking with  
16 either Mr. Leventon or Mr. Ellington?

17           THE COURT: Okay. Do I need to parse through the  
18 communications I saw? Do I need to parse-

19           MR. BONDS: Yeah, I think so. I mean, I don't  
20 understand.

21           THE COURT: Okay. I never authorized Mr. Ellington  
22 to be the settlement lawyer or whatever, okay? I never would  
23 have, okay? And maybe Mr. Seery, you know, said something to  
24 -- early on in the case to make him think he had that  
25 authority, but no, we're done. Okay? And I feel like it's

1 causing more harm than good right now. Okay?

2 I don't know who instructed all of these Dondero-  
3 controlled entities to hire lawyers. I don't know if  
4 Ellington and Leventon have been giving instructions to these  
5 entities. But we've got conflicts everywhere now. Okay?  
6 We've got -- and by the way, I'm just going to list them now.  
7 We have, of course, Bonds Ellis representing Dondero. We have  
8 Doug Draper, Heller Draper, now representing these trusts, Get  
9 Good Trust, Dugaboy Investment Trust. We have K&L Gates and  
10 now Munsch Hardt also representing the Advisors, NexPoint and  
11 the various CLO or other Funds. We have CLO Holdco  
12 represented by Kane Russell Coleman Logan. We have NexPoint  
13 Real Estate represented by Wick Phillips. Who have I left --  
14 and, of course, the employees, Baker & McKenzie and Ms. Smith.  
15 We have Spencer Fane in there for other current or former  
16 employees. We have Loewinsohn Flegle in there for certain  
17 former or current employees.

18 I mean, the proliferation of lawyers. And again, I don't  
19 know if Mr. Ellington and Mr. Leventon have had a role in  
20 hiring counsel, wearing their hat for these other entities or  
21 not. Can anyone tell me? Maybe I'm worried about something I  
22 shouldn't be worried about.

23 MR. DONDERO: You're worried about something you  
24 shouldn't worry about, Your Honor.

25 THE COURT: Okay. So Ellington --

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1 MR. MORRIS: Your Honor, I would just point to the  
2 evidence that's in the record, Your Honor. You have Mr.  
3 Dondero asking Mr. Ellington to show leadership in  
4 coordinating all of the lawyers you just mentioned. It's in  
5 the record.

6 THE COURT: Yes. I'm just going to, until otherwise  
7 ordered, no conversations between Dondero and Ellington and  
8 Leventon, and that's just going to be my ruling until further  
9 order. That's what I feel best about.

10 Now, let me ask you, knowing that I could only give you a  
11 half a day on the 28th of January, if we start the  
12 confirmation hearing on whatever the plan looks like on  
13 January 27th, I mean, do people want to go with that, --

14 MR. POMERANTZ: Your --

15 THE COURT: -- even knowing we might not finish that  
16 day, or no?

17 MR. POMERANTZ: Your Honor, this is Jeff Pomerantz.  
18 Maybe if we could start on the 26th, have the 26th, 27th, and  
19 then maybe half of the 28th. I would think two and a half  
20 days should be enough, notwithstanding the volume of  
21 objections, because I think you'll find that, while there may  
22 be some evidence, I think the majority of the objections are  
23 really legal in nature.

24 THE COURT: All right. Traci, are you out there in  
25 video-land?

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1 THE CLERK: Yes, I'm here.

2 THE COURT: Okay. Have I overcommitted the 26th? If  
3 we start the 26th at 9:30 in the morning, can we do that? Or  
4 --

5 MR. BONDS: Your Honor?

6 THE CLERK: That'd be fine.

7 THE COURT: Okay.

8 THE CLERK: Just remember that you have an  
9 appointment at lunchtime that day at noon on the 26th.

10 THE COURT: Okay. I --

11 THE CLERK: You don't have any court hearings.

12 THE COURT: Okay.

13 MR. BONDS: Your Honor, I'm sorry.

14 THE COURT: Go ahead.

15 MR. BONDS: Your Honor, I'm sorry. This is John  
16 Bonds. I have a hearing on the 26th that I can't miss.

17 THE COURT: Well, can someone else --

18 MR. POMERANTZ: Your Honor, we would request, right,  
19 that Mr. Lynn lead the confirmation hearing. There's a lot of  
20 lawyers. If we try to look at everyone's calendar, we're  
21 never going to be able --

22 THE COURT: Yes.

23 MR. POMERANTZ: -- to get something that's good for  
24 everyone.

25 THE COURT: Okay. Yes. Well, Mr. Lynn or Mr. Assink

1 can handle it, Mr. Bonds.

2 So we're going to start the 26th at 9:30. We'll go all  
3 day, except I have something at lunchtime, apparently. And  
4 then we'll go all day on the 27th, and then I can give you  
5 half a day on the 28th.

6 So you'll upload immediately a notice to that effect, Mr.  
7 Pomerantz.

8 MR. POMERANTZ: Yes, we would.

9 Your Honor, in terms of our documents in support of  
10 confirmation, we want to make it convenient with the Court.  
11 We know your Court would at least need one business day, so we  
12 would prefer to file, say, by 2:00 Central on the 24th, on a  
13 Sunday. Everyone will have it, and have one business day. I  
14 mean, the old order only had one business day in advance as  
15 well. So that's what we would propose for our confirmation  
16 documents to be filed.

17 MR. RUKAVINA: Your Honor, this is Davor Rukavina.  
18 An important issue here is how the creditors have voted, and I  
19 have no idea how they have voted. The voting deadline has  
20 expired. So I have no problem with what Mr. Pomerantz  
21 suggests, but I do think that the Debtor should file its  
22 tabulation of votes sooner rather than later so we all know  
23 one of the central elements for the hearing that we'll have.

24 THE COURT: Okay.

25 MR. POMERANTZ: That's fair, Your Honor. We're

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1 prepared to file the summary of voting and tabulation by the  
2 15th of January.

3 THE COURT: Okay. Very good.

4 So, backing up, Mr. Pomerantz, you asked that I approve  
5 you filing any plan modifications by noon on Sunday, the 24th?  
6 Is that what you said?

7 MR. POMERANTZ: Yeah. So, there's a couple of  
8 things. There's our confirmation brief.

9 THE COURT: Uh-huh.

10 MR. POMERANTZ: There is our -- any evidence we would  
11 submit, although I suspect we are likely to provide live  
12 testimony, as opposed to a declaration. There was our summary  
13 of ballots, which we will now do on the 15th. And to the  
14 extent we have any modifications, we would provide them on  
15 Sunday by 12:00 noon Central time as well. Yes.

16 THE COURT: All right.

17 MR. RUKAVINA: Well, Your Honor, this is Davor  
18 Rukavina. Does that mean the witness and exhibit lists also  
19 will not be due until Sunday at noon? Because I would request  
20 that we have the normal period of time to exchange exhibits  
21 and witnesses.

22 MR. BONDS: Your Honor, I think that the normal time  
23 period is also important in this case.

24 THE COURT: Okay. I'm going to --

25 MR. POMERANTZ: Your Honor, we could -- if everyone



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1 agrees on witness lists, we could do those by 5:00 p.m.

2 Central on the 22nd.

3 THE COURT: Okay. Let's do that. Okay.

4 MR. POMERANTZ: But that -- but that needs to be for  
5 everybody.

6 THE COURT: Oh, it will be for everyone.

7 MR. RUKAVINA: Your Honor, no problem.

8 THE COURT: Okay. Let's --

9 MR. POMERANTZ: 5:00 p.m. Central Standard Time.

10 THE COURT: No more discussions. That'll be the  
11 ruling, okay? Everything is going to be due by 5:00 p.m.  
12 Central time on Friday, the 22nd. All right.

13 MR. POMERANTZ: Your Honor, is that our brief as  
14 well, or --

15 THE COURT: Yes.

16 MR. POMERANTZ: -- was that just the witness list?

17 THE COURT: Everything. Brief, witness list, and --

18 MR. POMERANTZ: Okay.

19 THE COURT: -- plan mods.

20 Let me look through my notes and see if there's anything  
21 else I want to say. You know, let me do some quick math here.  
22 I know there was one other thing I wanted to say that involves  
23 math. Okay. I think my math is right here. Okay. You know,  
24 I mentioned the proliferation of lawyers. And let me just say  
25 this. We had -- we've had about 90 people on the -- showing

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1 up on the video screen today -- 89, 90, 91, 92. A few, a  
2 little over 90. Okay? So let's say 90. It's been up to 95  
3 earlier. But let's pretend that 60 of those are lawyers  
4 billing by the hour. That's very conservative. Probably many  
5 more than 60. And let's assume conservatively that the  
6 average billing rate is \$700 an hour. That's probably very  
7 low, right? We probably don't have many baby lawyers on the  
8 phone. So that's a very low average. So, 60 lawyers times  
9 \$700 an hour, \$42,000 an hour this hearing has cost. And then  
10 we've been going over seven hours. So let's say seven,  
11 conservatively, times \$42,000. This hearing has cost \$294,000  
12 today. A preliminary injunction hearing. I mean, no one  
13 thinks that's chump change. I don't know, maybe some people  
14 do. This just seems like a ridiculous way to spend resources.  
15 No offense to all the wonderful lawyers, but this is just --  
16 it's crazy-town, right? It is crazy-town. So I implore you,  
17 okay, how about I use that word, I implore you to have these  
18 good-faith discussions on a pot plan.

19 Please, Mr. Dondero, I mean, don't waste people's time.  
20 \$160 million, I know that's not going to cut it. Okay? So  
21 it's going to have to be more meaningful. I just know that in  
22 my gut.

23 But having said that, I mean, I honestly mean I think a  
24 pot plan -- I think you getting your baby back is the best  
25 thing for everyone. Okay? I think it's the best thing for

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1 everyone. So I want you all to --

2 MR. DONDERO: Judge, I -- Judge, I just need to  
3 interject for a second, because no one follows the big  
4 picture. We filed for bankruptcy with \$450 million of assets.  
5 \$360 million of third-party net assets, \$90 million of  
6 affiliated notes. The third-party assets are down to \$130  
7 million and falling fast.

8 MR. POMERANTZ: Your Honor, I hate to interrupt Mr.  
9 Dondero, but that is not the purpose of this hearing.

10 THE COURT: Well, --

11 MR. POMERANTZ: Mr. Dondero's statement of the assets  
12 and value is just not something that the Debtors would agree  
13 and support. I'm sure it's not something the creditors -- I  
14 think we understand what Your Honor is saying. I think the  
15 Committee understands. And Your Honor knows that the Debtor  
16 and the Committee are close to the asset values. And Mr.  
17 Dondero should be making his argument to the Debtor and the  
18 Committee, not Your Honor, in this open forum.

19 THE COURT: Okay.

20 MR. POMERANTZ: It's just not appropriate.

21 THE COURT: And I understand where you're both coming  
22 from. And he's saying that because I made the comment I made  
23 about \$160 million not being enough.

24 I've seen the evidence. I've heard the evidence at prior  
25 hearings, Mr. Dondero. We've had a lot of hearings. And I

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1 remember writing that down. Wow, why did that happen? Seeing  
2 the dissipation of value. I couldn't remember the exact  
3 numbers, but I thought it was like \$500 million something and  
4 then \$300 million or whatever. And I remember Multi-Strat,  
5 that being sold, and blah, blah, blah, blah.

6 But having said that, there are a lot of causes of action  
7 that have been hinted at by the Creditors' Committee and  
8 others. So, causes of action is one of the things they are  
9 looking at when they start thinking about what's appropriate  
10 value.

11 So I just, I get where everyone is coming from. I get  
12 where everyone is coming from. But, again, let's take one  
13 more stab at this, please. Okay?

14 MR. POMERANTZ: Yeah. And Your Honor, my last  
15 comment. We're commercial people. The creditors are  
16 commercial people. I think we've done a tremendous job in  
17 being able to resolve most every one of the significant  
18 claims. I think the Court should trust the process. Mr.  
19 Dondero should trust the process.

20 And again, if there's a commercial deal to be worked out,  
21 I don't think there's anyone more than of course the Debtor  
22 and the people on the Committee, who have been litigating in  
23 many cases with Mr. Dondero and Highland for ten years, I  
24 don't think it's anyone's desire. So if there's a reasonable,  
25 rational proposal that the creditors can get behind and want

1 to engage, then there'll be a discussion. If they don't  
2 believe it's a reasonable, rational proposal, they won't.

3 THE COURT: Yes. All right. Well, I do feel very  
4 good about what I've heard about the UBS issues being worked  
5 out. I mean, we have come a long way in 15 months, even  
6 though it's frustrating to me and others. But, again, I know  
7 you all are going to do what you need to do. And I'll look  
8 for the form of order. I'm going to see you all, Mr. Dondero,  
9 including you, next Wednesday. And if there's nothing else,  
10 we stand adjourned.

11 MS. SMITH: Your Honor, I'd like to review the form  
12 of order as it regards my clients before it's submitted.

13 THE COURT: Okay.

14 MS. SMITH: If I could have a courtesy copy, please.

15 THE COURT: Yes. Well, yes. I'm not going to  
16 require 90 lawyers to get the order, but I will ask Mr.  
17 Pomerantz, Mr. Morris, make sure Ms. Smith gets it and  
18 obviously Mr. Dondero's counsel gets it. And I probably won't  
19 get it until Monday, it sounds like, but --

20 MR. POMERANTZ: That's likely.

21 THE COURT: But I'll be on the lookout for it. Okay.  
22 Thank you. We stand adjourned.

23 MS. SMITH: Thank you, Your Honor.

24 THE CLERK: All rise.

25 MR. MORRIS: Thank you, Your Honor.

204

1 MR. BONDS: Thank you, Your Honor.

2 (Proceedings concluded at 4:09 p.m.)

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CERTIFICATE

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I certify that the foregoing is a correct transcript from  
the electronic sound recording of the proceedings in the  
above-entitled matter.

**/s/ Kathy Rehling**

**01/11/2021**

\_\_\_\_\_  
Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

\_\_\_\_\_  
Date

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## EXHIBIT 32



UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re:	)	Case No. 19-34054-sgj11
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	
	)	
Debtor.	)	
_____	)	
OFFICIAL COMMITTEE OF UNSECURED	)	Adv. Proc. No. 20-03195-sgj
CREDITORS,	)	
	)	<u>PLAINTIFF'S MOTION for</u>
Plaintiff,	)	<u>CONTINUANCE</u>
	)	
v.	)	
	)	
CLO HOLDCO, LTD., et al.,	)	
	)	
Defendants.	)	
_____	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Adv. Proc. No. 21-03003-sgj
	)	
Plaintiff,	)	
	)	<u>DEFENDANT DONDERO'S MOTION</u>
v.	)	<u>to COMPEL DISCOVERY, the</u>
	)	<u>TESTIMONY of JAMES P.</u>
JAMES DONDERO,	)	<u>SEERY, JR.</u>
	)	
Defendant.	)	May 20, 2021
_____	)	Dallas, Texas (Via WebEx)

Appearances in 21-03003:

For Plaintiff Highland John A. Morris  
Capital Management, Pachulski Stang Ziehl & Jones LLP  
10100 Santa Monica Boulevard, 13th Floor  
Los Angeles, California 90067

For Defendant-Movant Michael P. Aigen  
James Dondero: Stinson, L.L.P.  
3102 Oak Lawn Avenue, Suite 777  
Dallas, Texas 75219

Bryan C. Assink  
Bonds Ellis Eppich Schafer Jones LLP  
420 Throckmorton Street, Suite 1000  
Forth Worth, Texas 76102

Appearances continued on next page.



Appearances in 20-3195:

For the Official Committee of Unsecured Creditors:	Paige Holden Montgomery Sidley Austin LLP 2021 McKinney Avenue, Suite 2000 Dallas, Texas 75201  Matthew A. Clemente Sidley Austin LLP One South Dearborn Chicago, Illinois 60603
For Defendants Highland Dallas Foundation and CLO Holdco Ltd.:	Louis M. Phillips Kelly Hart & Pitre 301 Main Street, Suite 1600 Baton Rouge, Louisiana 70801  Amelia L. Hurt Kelly Hart & Pitre 400 Poydras Street, Suite 1812 New Orleans, Louisiana 70130
For Defendants The Dugaboy Investment Trust and The Get Good Nonexempt Trust:	Douglas S. Draper Heller, Draper, Patrick & Horn, L.L.C. 650 Poydras Street, Suite 2500 New Orleans, Louisiana 70130-6103
For Grant James: Scott, III:	John J. Kane Kane Russell Coleman Logan Bank of America Plaza 901 Main Street, Suite 5200 Dallas, Texas 75202
For UBS Securities LLC:	Andrew Clubok Latham & Watkins, LLP 555 Eleventh Street, NW, Suite 1000 Washington, D.C. 20004-1304
For Scott Ellington, Jean Paul Sevilla, Isaac Leventon, and others:	Frances Smith Ross & Smith, PC Plaza of the Americas 700 North Pearl Street, Suite 1610 Dallas, Texas 75201
Digital Court Reporter:	United States Bankruptcy Court Michael F. Edmond Sr., Judicial Support Specialist 1100 Commerce Street, Room 1254 Dallas, Texas 75242
Certified Electronic Transcriber:	Susan Palmer Palmer Reporting Services

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*Adversary 21-3003, Motion to Compel Discovery*

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1 Thursday, May 20, 2021

9:40 o'clock a.m.

2 P R O C E E D I N G S

3 THE COURT: - settings in Highland Capital adversary  
4 proceedings.

5 Before I start with that, I want to let anyone who is  
6 on the line for a different case, RE Palm Springs II, LLC, that  
7 the hearing we had on that matter was continued. Certain of the  
8 parties filed an agreed motion to continue, and so I continued  
9 that to June 9th at 9:30. So to the extent you are on the line  
10 only for the Palm Springs matter, that matter is not going  
11 forward today.

12 All right. So turning to Highland, I will start with  
13 the first-filed emergency motion. It was in Highland versus  
14 Dondero, Adversary 21-3003. Counsel for Dondero filed a motion  
15 to compel testimony of James Seery. So who do we have appearing  
16 for Mr. Dondero this morning?

17 All right. So -

18 MR. [SPEAKER]: I think he's on mute, Your Honor.

19 THE COURT: Sir, you are on mute. Try again.

20 MR. AIGEN: Ah, I apologize, Your Honor. Is this  
21 better?

22 THE COURT: Yes.

23 MR. AIGEN: Okay. Good morning, Your Honor. Michael  
24 Aigen from Stinson, representing Mr. Dondero. I apologize for  
25 that.

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5

1 THE COURT: All right. So you are now co-counsel with  
2 Bond Ellis, perceive?

3 MR. AIGEN: That is correct. The lead counsel from  
4 our firm is Ms. Deborah Deitsch-Perez. She unfortunately has  
5 medical emergencies going on with her family and is  
6 unfortunately unable to be here for this hearing.

7 THE COURT: All right. Thank you.

8 For Highland, who do we have appearing on this matter?

9 MR. MORRIS: Good morning, Your Honor. It's John  
10 Morris From Pachulski Stang Ziehl and Jones for the debtor.

11 THE COURT: All right. Thank you. I presume those  
12 are the only appearances on this discovery dispute.

13 MR. AIGEN: That's correct.

14 THE COURT: All right. Well, Ms. – Mr. Aigen, you're,  
15 I guess, new on the scene in the Highland matters. And let me  
16 just tell you I've read all the pleadings. So I am aware that  
17 of our numerous adversary proceedings, this is the one only  
18 involving Dondero as a defendant and only involving three notes.  
19 So, to help you find your argument, I'm going to say this. I  
20 remember when I was in law school – here comes a story – one of  
21 our law professors said a suit on a note is the simplest kind of  
22 lawsuit there is. And probably when you are a young lawyer and  
23 if you go to a civil business practice type law firm, this is  
24 probably where you're going to get your feet wet.

25 And so, with that in my brain and having read the

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1 pleadings, I'm asking: Why is this going to be complicated  
2 where we need extensive discovery from the CRO/CEO who came on  
3 the scene post bankruptcy two plus years after the notes?

4 So that's what's in my brain having read the  
5 pleadings. And so convince me why I'm totally misreading the  
6 situation.

7 MR. AIGEN: Thank you, Your Honor. I appreciate that.  
8 One thing I want to make sure we understand is this is we're  
9 seeking to compel deposition testimony for Mr. Seery in his  
10 corporate rep capacity. We're not specifically asking for Mr.  
11 Seery. We sent corporate rep depo topics over. They told us  
12 Mr. Seery would be the corporate rep but they objected to  
13 certain topics, as is their right. The specific topics, as you  
14 know, we're seeking discovery on, there's Numbers 9, 14 through  
15 17 go together, Number 20. In that sense what we're seeking  
16 discovery on is a defense that we have asserted in this  
17 proceeding that's currently pending.

18 As I'm sure you know from reading the pleadings, one  
19 of Mr. Dondero's defenses is that there was a subsequent oral  
20 agreement that the home would be discharged based upon certain  
21 conditions being met. Highland, as is their right, believes  
22 that this oral agreement never happened. And, as a result, it  
23 contends that the defense has no merit. In their motion, I  
24 think it was, or in their response, paragraph 4, they  
25 specifically say that this defense has no basis in fact. That's

*Adversary 21-3003, Motion to Compel Discovery*

7

1 their right. The problem, however, is just taking this  
2 position, based on this position they're also saying, well, we  
3 don't get discovery on this event.

4 And although we're talking about six different  
5 requests, it really comes down to three different areas, and  
6 I'll jump into those and explain each one. The first one, which  
7 I think is the most straightforward, is topic nine, which asks  
8 for testimony regarding Mr. Dondero's defenses. Initially we  
9 got a response saying that the objection wasn't relevant and  
10 then they filed a response. And I think they realized that  
11 might not have made a lot of sense saying it wasn't relevant, so  
12 they said it was vague or invalid.

13 Counsel's well aware, as you are, what are defenses in  
14 this case. They served discovery on these defenses. We  
15 responded. They never complained that they're inadequate. They  
16 know that our defense, at least one of them, is there had been  
17 oral agreement on the loan, that it would be forgiven if certain  
18 conditions occur, and that's what we want to take discovery on.

19 I'm confident counsel has interviewed Highland  
20 employees to see who knows anything about this agreement. I'm  
21 sure it's very possible that no one knows anything about this  
22 agreement, and that's fine. But we certainly have a right to  
23 ask the corporate rep about this and find out if anyone's going  
24 to talk about this oral agreement at trial. This isn't  
25 burdensome discovery -

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8

1 THE COURT: Can I – can I – let me ask a question  
2 right there. The defense is based on an oral agreement. I mean  
3 your client is the payee on the notes – excuse me – excuse me –  
4 the maker. It's easy to get confused here. He's the maker on  
5 the notes, but he was the CEO of the payee on the notes. So  
6 this is not Bank of America makes a loan to Joe, the plumber,  
7 or, you know, I mean this is – he's on both sides of the  
8 transaction. So he knows who the oral agreement was made with,  
9 right?

10 MR. AIGEN: Correct, Your Honor.

11 THE COURT: So, again, I'm trying to understand –

12 MR. AIGEN: May I follow up –

13 THE COURT: – the depth of the discovery needed.  
14 Presumably, I think I read in here, that you're deposing – or I  
15 don't know if it's agreed or not – you're deposing various other  
16 Highland former employees. But – but I don't understand why the  
17 current CEO that was not around before the bankruptcy would have  
18 any personal knowledge about oral agreements. I mean this would  
19 all be in Mr. Dondero's head, right?

20 MR. AIGEN: Your Honor, I absolutely agree. And there  
21 are, I guess, two parts to that answer. One is we aren't taking  
22 other Highland employees' depositions. We've asked for them,  
23 and they have refused to give them to us and said they're  
24 irrelevant. We're trying to work that issue out. And we may  
25 get one of their depositions. If they go give us one for a



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1 couple hours and drop off, but this is – right now this is the  
2 only discovery we're getting. Their doc requests, they're not  
3 going to give us any documents related to these topics. So this  
4 is our chance to get discovery on it.

5 As to his personal knowledge, he's their corporate  
6 rep. As a corporate rep, he can go figure out what other people  
7 know. But they're going to put someone on the stand – and I  
8 think it's important, Your Honor, obviously they're going to  
9 make a defense in this case – or, sorry – which stops our  
10 defense with legal arguments saying even if this oral agreement  
11 occurred and took place, it's not legally enforceable. I  
12 understand.

13 THE COURT: Yeah, and what about –

14 MR. AIGEN: I mean this is –

15 THE COURT: – what about that? What about that? I  
16 mean it's hard not to separate the need for discovery from that,  
17 so what about that?

18 MR. AIGEN: Well, your – yeah. No, that's – if they  
19 file a summary judgment on a legal issue, then we will address  
20 that in our summary judgment legal issue, but right now we have  
21 a pending defense. And, Your Honor, one of their responses to  
22 our defense, as they put in their response in paragraph 4, they  
23 specifically state that this oral agreement never occurred. So  
24 I need to know how they know that, who are they going to put on  
25 the stand. I don't know which people are saying that. So we

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10

1 ask for – to put it down into corporate rep topic. They could  
2 have given us anyone. They decided to give us Mr. Seery. But,  
3 yes, he may not have personal knowledge, but that's who they  
4 chose for their corporate rep to testify on this topic.

5 He's the only one I'm able to get this information  
6 from. And he may come up and say no one knows anything about  
7 that. That's fine. But they have already said: We're taking  
8 the position that this oral agreement never occurred. I don't  
9 know how they know that, I don't know who they're going to put  
10 on the stand, but they are taking a factual position on that.  
11 So we should have a right to take discovery on it. Whether they  
12 don't think this is a legally-valid defense, well, that's fine,  
13 they could have moved for summary judgment on day one. They  
14 didn't. As of now, this defense is still pending.

15 We have less than two months until trial. I don't  
16 know when the summary judgment's going to come, so there's not  
17 going to be a chance to wait until the legal aspects of these  
18 defenses are heard and then take discovery. This is our one  
19 opportunity to do it.

20 THE COURT: Okay. So this is topic number nine. And  
21 you say why not, let us ask a few questions, it may be five  
22 minutes of questioning if he doesn't really know anything. Is  
23 that a summary of your position?

24 MR. AIGEN: Well, yeah, he may not know anything and  
25 they may not know anything, or they may, yes. I don't know how

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11

1 much time it's going to take. The fact that they put in writing  
2 that this agreement never occurred makes me think that someone  
3 must know something, but I don't know. It could be on that.  
4 that –

5 THE COURT: All right.

6 MR. AIGEN: – it's certainly possible, Your Honor.

7 THE COURT: All right.

8 MR. AIGEN: That – and then the second topic or  
9 second, I guess, group is 14 through 17 where we ask about  
10 information about loans made by Highland or the debtor that were  
11 particular to other people. And the reason these requests are  
12 relevant is, once again, – well, not once again – but it's our  
13 position that Highland commonly entered into these types of  
14 agreements. They're saying: Hey, this never happened, this  
15 agreement didn't take place.

16 So the fact that Highland entered into other similar  
17 type loan agreements with similar type business group  
18 provisions, although maybe not dispositive, it certainly leads  
19 to evidence that this agreement did in fact take place in the  
20 situation where they're telling you and putting a pleading and  
21 writing in the pleading, hey, this never – this agreement never  
22 took place. So this is relevant –

23 THE COURT: So – so – so –

24 MR. AIGEN: – and, like I said, –

25 THE COURT: – on topics 14 through 17 you're saying

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1 it's relevant if loans were made to other employees or officers  
2 besides Mr. Dondero and it's relevant if those loans were  
3 forgiven or not as to these three notes?

4 MR. AIGEN: Correct, Your Honor. Because they are  
5 challenging that this agreement took place, for the –

6 THE COURT: Well, –

7 MR. AIGEN: – fact that other similar –

8 THE COURT: – what if they did do this with another  
9 employee, why is that relevant these three notes?

10 MR. AIGEN: Well, because they're challenging that our  
11 oral agreement took place. The fact that oral agreements like  
12 this were routine at Highland would make it more believable and  
13 factual that our agreement took place, in light of their  
14 challenge to the fact that the agreement took place.

15 Like I said, if they were just making legal challenges  
16 to whether the agreement is enforceable, that would be one  
17 thing. So instead they're also taking the position, hey, we  
18 don't think this actually took place. So all – if Highland  
19 routinely entered into agreements like this for other employees,  
20 like I said, I understand that wouldn't be dispositive, but that  
21 would tend to show that this pattern and practice of Highland  
22 did include oral agreements like this.

23 THE COURT: Okay. I don't mean to get off on a  
24 tangent here, but, you know, are there going to be a lot of  
25 fraudulent-transfer lawsuits if in fact there was debt forgiven

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1 in the couple of years or four years leading up to bankruptcy?  
2 And are we going to have – well, I just don't understand, you  
3 know, the obvious big tax exposure to your client and other  
4 human beings if your – if your argument prevails, but I guess I  
5 shouldn't – I shouldn't second guess legal strategy, but my  
6 brain can't help to go there.

7 All right. But, again to the relevance, your defense  
8 is: There was an agreement to forgive these notes. It was oral  
9 and we're entitled to discovery regarding other loans to other  
10 employees for which there might have been oral forgiveness  
11 because that will help establish our defense; that's the sum and  
12 substance of categories 14 through 17?

13 MR. AIGEN: That's correct, Your Honor.

14 THE COURT: Okay.

15 MR. AIGEN: And obviously I don't think there's any  
16 need to try the ultimate legal issues here, but we're well aware  
17 of these tax issues and we've worked into it, and so there are  
18 different tax consequences depending on how conditions are  
19 structured and it's my understanding that in situations like  
20 this there wouldn't be sort of tax consequences, but that's an  
21 issue for another day. But because you raised it, Your Honor, I  
22 want to make sure that you know we are aware of that issue and  
23 that is something we're prepared to address when it – when it  
24 comes before this.

25 So should I move on to the last – last topic, Your

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14

1 Honor?

2 THE COURT: Okay.

3 MR. AIGEN: The last topic is Request Number 20 which  
4 asks for testimony regarding compensation paid by Highland to  
5 Mr. Dondero. And I know this might be a little unusual because  
6 someone should know what they were paid, but obviously in a  
7 situation like this where we don't have control of all the  
8 records and the pay structure is complicated, we don't have all  
9 of that, so it's a little different than your usual situation.  
10 And the reason this is relevant, obviously this goes to the  
11 forgiveness aspect of it, and basically information regarding  
12 Mr. Dondero's compensation will be helpful or relevant because  
13 it shows part of the story here is that if you look at his  
14 compensation as a whole, he was underpaid and the notes were  
15 forgiven as part of this compensation which goes along with the  
16 underpaid. In other words, it puts this oral agreement into  
17 context and explains why it is thus. Again, they're saying this  
18 never happened, so as part of our presentation of our case,  
19 we're going to explain why this was done and why it makes sense.  
20 And to put that into context, we want information related to Mr.  
21 Dondero's compensation. We're not asking for other people's  
22 compensation on this, we said information related to Mr.  
23 Dondero's own compensation.

24 And, again, I understand that counsel thinks that  
25 these defenses have no merit. That's their right. That makes

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1 sense. And I assume they will file a summary judgment on these,  
2 but they haven't done it. These defenses are currently pending.  
3 We're going to trial in less than two months. We may not be  
4 getting anyone else's depositions. They're not giving us  
5 documents on this topic. And I understand it may be a little  
6 unique to have Mr. Seery testify on this, but that's because we  
7 just presented them with topics. That's the witness they are  
8 putting forward, which is their right. I have no problem with  
9 that. But this is our one opportunity to get discovery on this  
10 and that's why we're before the Court today. Thank you for your  
11 time.

12 THE COURT: Okay. Just to clarify, I think I heard  
13 you saying Mr. Dondero doesn't have access to the records. Mr.  
14 Dondero doesn't have records regarding the compensation paid by  
15 Highland to him and any agreements related to that?

16 MR. AIGEN: He — he had some but not all.

17 THE COURT: Okay. Well, I don't understand that. Why  
18 would that be? He's the founder, he was the CEO of this company  
19 until three months after the bankruptcy was filed. He — I mean  
20 it sounds inconceivable to me that he wouldn't have everything  
21 he needs as far as what he was paid in the agreements regarding  
22 what he was paid by his company Highland.

23 MR. AIGEN: Well, Your Honor, fortunately or  
24 unfortunately I have not been involved what I understand is sort  
25 of disagreements between the parties here on Mr. Dondero's

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1 access to certain documents of Highland, but my understanding is  
2 he – Highland now has possession of all its documents. And he –  
3 I know there were requests between counsels on Dondero to get  
4 particular documents in other matters and other situations going  
5 on. But he – Highland is the one that has possession of those  
6 documents now, not – not Mr. Dondero.

7 THE COURT: Okay. He'd at least have his tax returns,  
8 right, and files regarding his tax returns?

9 MR. AIGEN: Correct, correct. Correct. Yes. Yes,  
10 Your Honor.

11 THE COURT: All right. Well, Mr. Morris, now for your  
12 responses in – I'm playing devil's advocate with you. If y'all  
13 have named Mr. Seery as a 30(b) corporate rep and out of these  
14 20 topics you agree to – two, three, four, five, six – I guess  
15 13 of the subject matters, what's the big deal about a few extra  
16 questions?

17 MR. MORRIS: A few – a few issues.

18 First, Your Honor, is Mr. Dondero on the line?

19 THE COURT: Well, that's a good question. I forgot to  
20 check that because I have ordered him in the past to be at every  
21 hearing.

22 Mr. Dondero, are you with us this morning?

23 Mike, did you see him –

24 MR. ASSINK: No, Your Honor. This is –

25 THE REPORTER: I haven't seen Mr. Dondero.



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17

1 THE COURT: Okay. Well, Mr. Aigen, what do you know  
2 about that? Or I see Mr. Bryan Assink is out there as well.  
3 What do y'all know about that?

4 THE REPORTER: He's on mute, Your Honor.

5 THE COURT: You're on mute, sir.

6 MR. ASSINK: Your Honor, I apologize. This is Bryan  
7 Assink of Bonds Ellis. I'm just trying to – I'm just trying  
8 to –

9 THE COURT: Okay. It sounds like someone's speaking,  
10 but I can't hear it.

11 THE REPORTER: Bryan Assink, his voice is low. He's –

12 THE COURT: Okay. Mr. Assink, please turn your volume  
13 up. We can barely, barely, barely hear you.

14 Mr. Assink.

15 MR. ASSINK: Your Honor, is that – is that better?  
16 I'm sorry. I tested this before –

17 THE COURT: Okay, it's better now. Go ahead.

18 MR. ASSINK: – I joined and –

19 THE COURT: Go ahead.

20 MR. ASSINK: Your Honor, this was set on an emergency  
21 basis, and we just didn't coordinate with Mr. Dondero. We  
22 didn't think he needed to attend these kind of nonevidentiary  
23 hearings and –

24 THE COURT: Mr. Assink, you asked for the emergency  
25 hearing. And you filed your motion Friday afternoon. We were

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1 in court Tuesday. And I was happy that you resolved our  
2 disputes Tuesday. And I remember saying: Preview of coming  
3 attractions, I guess I'll see y'all Friday, right. Right,  
4 nobody said anything about, uh, we have an emergency setting,  
5 we're hoping to have.

6 But, anyway, be that as it may, an hour or two after I  
7 got out of court Tuesday, my Courtroom Deputy was telling me  
8 that you were wanting the hearing this week. And I first said  
9 it'll have to be Monday. I mean we're – we've got a backlog of  
10 stuff in our queue that we're really trying to get out. And –  
11 and I understood that you really pressed for having this hearing  
12 today. I didn't see the – all the emails, but my Courtroom  
13 Deputy said you all really wanted this hearing today, not  
14 Monday.

15 So, with that, why would you press for today if Mr.  
16 Dondero wasn't available, number one? And, number two, why  
17 would you think he wasn't needed? I mean it was a couple of  
18 hearings ago that I said someone pull out my order and see what  
19 I said, because I couldn't remember the exact wording –

20 MR. ASSINK: No, Your Honor, I apologize. I'm sorry,  
21 Your Honor. I apologize. There's been a lot going. I think it  
22 – the coordination might have just slipped. I'm not sure, Your  
23 Honor, I wasn't sure what order required him to be here today  
24 with the preliminary injunction dissolves but, you know, it  
25 wasn't our intention that he would not – he would not appear.

*Adversary 21-3003, Motion to Compel Discovery*

19

1 We – it was more just a coordination thing. We intend that he  
2 will be at all hearings before, Your Honor, you know, Friday's  
3 hearing and substantive hearings. I just – I think this is more  
4 of a coordination issue, Your Honor, and I apologize.

5 THE COURT: Okay.

6 MR. ASSINK: There has been a lot going on.

7 THE COURT: Oh, don't I know. There's two of us, me  
8 and my Law Clerk working on this, and there are a bunch of  
9 y'all. So, yes, I feel – I feel absolutely what you feel and  
10 more as far as a lot going on.

11 So let me clarify. My language that ordered Mr.  
12 Dondero to be at every hearing was in the preliminary injunction  
13 that's now superseded by the agreed order y'all announced  
14 Tuesday. So are you telling me you thought now that mandate  
15 didn't apply? Is that one of the things –

16 MR. ASSINK: Not – not specifically, Your Honor, –

17 THE COURT: – I'm hearing?

18 MR. ASSINK: Not specifically, Your Honor. We thought  
19 perhaps the formal mandate in the order was no longer applying,  
20 but our understanding was you would want Mr. Dondero at  
21 substantive hearings going forward, and that has been our  
22 understanding. And we would expect him to be before Your Honor  
23 at all such hearings. Part of the basis, the reasoning he's not  
24 here today was perhaps as an oversight on my part due to the  
25 scheduling, and I had a lot of deadlines yesterday and I think

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1 it just maybe fell through the cracks, and I apologize, Your  
2 Honor.

3 THE COURT: All right.

4 MR. ASSINK: You know, we – Your Honor, –

5 THE COURT: Well, I'm going to say a couple of things.  
6 You know this could have been raised Tuesday, when we were here  
7 on the adversary proceeding, in which the preliminary injunction  
8 was issued, okay, it would have been – it would have been wise,  
9 it would have been very wise to raise the issue.

10 Second, it screams irony, if nothing else, that at a  
11 time when I have under advisement a motion to hold Mr. Dondero  
12 in contempt of Court that there would be a trip-up, the  
13 second-recent trip-up, by the way, where he didn't appear at a  
14 hearing. There was a time a few weeks ago, two or three weeks  
15 ago, can't remember what hearing it was then, but he wasn't  
16 here.

17 Okay. The –

18 MR. ASSINK: Well, Your Honor, I just want to say –

19 THE COURT: – the third thing I'm going to say – the  
20 third thing I'm going to say is I guess I'll issue an order in  
21 the main case now, you know, a one- or two-sentence order in the  
22 main case saying repeating the sentence that was in the  
23 preliminary injunction, that he's going to show up at every  
24 hearing. I never said only at substantive hearings. The only  
25 thing I hesitated on at all, because I've done this in other

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1 cases, is sometimes I'll say any hearing at which, you know, the  
2 person is taking a position, okay, an opposition, an objection,  
3 you know, even if you file a pleading taking a neutral stand, if  
4 he's going to file a pleading that requires the Court and all  
5 the lawyers' attention to some extent, he's going to need to be  
6 in court. So that's something I thought about doing, but then I  
7 was reminded, that I said, no, he's just going to be at all  
8 hearings in the future.

9 And procedural, substantive, I never made that  
10 distinction and I never would because – because it's taking up  
11 time, it's taking up time of the Court, lawyers, parties. And  
12 if he is going to use the offices of this Court or, you know,  
13 take up the time of any lawyers, then he needs to be a part of  
14 it, okay?

15 MR. ASSINK: Your Honor, yes, I –

16 THE COURT: So I thought I made that very clear the  
17 last time he didn't show up, but I think –

18 MR. ASSINK: Your Honor, I apologize. You know that's  
19 certainly not our intention here. We've been rushing around. I  
20 think this is more – this is more on – on me and just the fast  
21 pace with everything. We would intend that he would be here at  
22 all hearings. We're not trying to make any exception. We're  
23 not trying to say that the preliminary injunction got rid of his  
24 obligation to be before, Your Honor. You know, we weren't clear  
25 exactly what the directive was for these kinds of hearings, or

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1 at least perhaps I wasn't fully, and – but, nevertheless, Your  
2 Honor, we would – we would have had him be here. I think the  
3 fast pace with the hearing settings and just everything going  
4 on, it might have slipped through the cracks. It's not – there  
5 was no ill will with him not being here, Your Honor. I  
6 apologize. It's just an oversight on our part. We would  
7 anticipate that he will be here for all future hearings. You  
8 know it's no disrespect to the Court. It was not an intentional  
9 thing. We apologize, Your Honor. So I understand the Court's  
10 comments. It's – but I just want to make clear it's we're not  
11 trying to be cute, we're not trying to say that, oh, the  
12 preliminary injunction is gone, he doesn't have to be here.  
13 That's not our intention, Your Honor. It was I think just an  
14 oversight and a scheduling issue this time, but Mr. Dondero will  
15 of course appear before Your Honor in all matters going forward,  
16 so I apologize.

17 THE COURT: All right. Well, again, you're  
18 scheduling. You sought the scheduling, you sought the emergency  
19 hearing, and this is the second time we've had this discussion  
20 in less than a month.

21 All right. So, Mr. Morris, back to you. I think –

22 MR. MORRIS: Yeah.

23 THE COURT: – you were about to answer the question of  
24 if Mr. Seery is going to be produced and talk about 13 different  
25 topics, why is it a big deal to talk about these other seven

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1 topics.

2 MR. MORRIS: Because there is no way to prepare a  
3 witness for the vague statements that are being offered by  
4 counsel. I'll point out that Mr. Aigen is yet another former –  
5 a lawyer who formerly represented Highland and is now suing us,  
6 but we'll dispense with the disqualification motion right now.

7 Your Honor, here is the deal. There have to be some  
8 limits, there have to be some reasonable limits. As you  
9 started, Your Honor, in law school you're taught that a  
10 collection case under demand notes is the simplest thing there  
11 is. In fact, in New York there's a special provision in state  
12 law that permits a plaintiff to file a motion for summary  
13 judgment in lieu of a complaint when they have an instrument  
14 such as a note, which is exactly what we have here.

15 Mr. Dondero has already admitted in his answer, in his  
16 interrogatories, and in his answers to several requests to admit  
17 that the notes are valid, that he received the money  
18 contemporaneously with the notes. When he signed the note, he  
19 received the money. The debtor has made demand and he hasn't  
20 paid, so we will be moving for summary judgment on that basis.

21 So let's look at what the defenses are and why we just  
22 feel like it's a burden on the debtor to even entertain these  
23 concepts. His first answer, Your Honor, said that the notes  
24 were forgiven based on an agreement. So we asked him in the  
25 interrogatory or request to admit, I forget which, show us your

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1 tax returns that you paid the taxes. Of course he didn't pay  
2 taxes because of course the note wasn't forgiven. So instead he  
3 amends his answers, he amends the affirmative defense to add the  
4 words: Pursuant to a condition subsequent. Okay, he didn't say  
5 that the first time.

6 The first time it was – it was forgiven and now it's  
7 not forgiven but it's basically deferred until a condition  
8 subsequent. So he is not even contending. If you look at his  
9 amended answer, he's not even contending that it was forgiven,  
10 he's simply saying that the obligation to repay has been  
11 deferred pursuant to an oral agreement under which he does have  
12 to pay until the debtor completes the liquidation of his assets,  
13 basically, if you read it. That's what it says. And that's how  
14 we got here.

15 I don't know if you picked up on it, Your Honor, but  
16 in response to an interrogatory, when we said who made the  
17 agreement on behalf of the debtor, Mr. Dondero said that he did.  
18 Okay, this isn't an oral agreement unless he was talking to  
19 himself. This is something that happened, according to him, in  
20 his head; that somehow he, as the maker of the note, had a  
21 discussion with himself in his capacity as the chief executive  
22 officer of the debtor, and the two of them, in his head, agreed  
23 that he wouldn't have to pay. Initially wouldn't have to pay at  
24 all and now apparently doesn't have to pay until the debtor  
25 completes its sale of assets. That is what the defense is here,



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1 so let's be very, very clear about it.

2           It's not an oral agreement, it's something that he's  
3 making up in his head that he didn't make up the first time,  
4 that he changed the second time, and that he – that he can't  
5 describe at all. One of the interrogatories said: When did  
6 this take place. He didn't answer that part of the  
7 interrogatory. He hasn't told us.

8           And here is the interesting thing, Your Honor. He's  
9 partially performed. He has admitted in response to – I forget  
10 if it was an interrogatory or a request to admit, it's in our  
11 papers – he has admitted that in December 2019, after the  
12 petition date, and while he was still in control of the debtor,  
13 that he made a payment to the debtor, a portion of which was  
14 used to pay principal and interest on one or more of the notes,  
15 so. So either he made that payment after he made his agreement  
16 in his head that it would be deferred, which makes no sense, or  
17 he entered the agreement in his head after the time that he made  
18 the payment, which would be in violation of the automatic stay,  
19 because how did he just get to forgive or to defer payment of an  
20 obligation to the debtor without seeking permission from the  
21 Bankruptcy Court. Those are the only two possibilities here,  
22 okay.

23           So I don't want to have to prepare my client for such  
24 nonsense. I don't think we should be required to prepare my  
25 client for such nonsense. And if you take a look at the other

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1 so-called affirmative defenses, he's got waiver, but he doesn't  
2 know — he doesn't identify how we waived, when we waived, who  
3 waived. And, in fact, it's completely contradicted from the  
4 evidence that's already in the record. Every single monthly  
5 operating report, all of the debtor's contemporaneous books and  
6 records, they're in the record. I actually submitted them in  
7 opposition to his first request for an adjournment of this  
8 proceeding because I wanted — I put my cards on the table, Your  
9 Honor. I really don't — I don't like to play games. I put my  
10 cards on the table. They see all of that. All of that is  
11 there. The debtor has — can see them. So how could we have  
12 waived everything.

13 Consideration, I'm supposed to prepare my client to  
14 answer questions on his defense of lack of consideration, when  
15 Mr. Dondero has already admitted that he received the face  
16 amount of each note at the time the note was executed? What —  
17 we should not be entertaining this.

18 And let's talk about topics 14 to 17, the so-called  
19 other loans that were forgiven. Mr. Dondero was the president  
20 and chief executive officer of this company for decades. Has he  
21 identified one single person who received a forgiven loan?  
22 Nope. Has he identified one loan that was ever forgiven? Nope.  
23 Has he ever contended that he had a forgivable loan? Nope.  
24 He's got this vague and ambiguous defense that somehow — it's  
25 not even a defense, frankly. His defense is that he had an oral

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1 agreement with himself, either he did or he didn't, right.  
2 We've got document requests outstanding. They were due weeks  
3 ago. Mr. Aigen has promised me in writing tomorrow, tomorrow,  
4 Friday. May 21st, he's going to complete his document  
5 production.

6 We've gotten two documents so far, two bank statements  
7 that show his receipt of the loan proceeds, right. We don't  
8 have – there is no evidence for this. We don't have the  
9 identification of a loan that was ever forgiven. We don't have  
10 the identification of a person whose loan was forgiven. We have  
11 nothing. How can we possibly prepare?

12 Rule 30(b)(6) actually requires them to describe with  
13 reasonable particularity the matters for examination. How do I  
14 prepare my client on – on these things? What he's trying to do,  
15 I think what they're trying to do is be cute, of course, and  
16 they're trying to – they want to ask Mr. Seery and Mr. Seery  
17 will say, 'I don't have any knowledge of this.' And then  
18 they're going to show up to trial and they're going to put on a  
19 case and say, 'Mr. Seery didn't have any knowledge of it, so he  
20 can't rebut,' or something – something silly like – I mean I  
21 don't really know what they're doing. This is just such bad  
22 faith.

23 Your Honor, you heard counsel say that the loan was  
24 forgiven or deferred, but it's not even forgiven. So – so it  
25 doesn't even make sense, but you heard him say that he was

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1 underpaid, that Mr. Dondero was underpaid and that there's some  
2 connection not with forgiveness because he's admitted that he's  
3 now changed his story, it hasn't been forgiven. It was  
4 originally forgiven, now it's just deferred, and that that  
5 happened because he was underpaid. Does that make any sense at  
6 all?

7           The guy who was in control of this enterprise from day  
8 one, and I'm supposed to prepare my client to provide a history  
9 of Mr. Dondero's compensation. He doesn't know what he was –  
10 did he not pay his taxes? Should we go down that path and  
11 should I now start subpoenaing his tax returns? Because I think  
12 that's appropriate. If you want to ask what I have, I want to  
13 know what you have. So maybe Mr. Aigen can agree on the record  
14 that I can have Mr. Dondero's tax returns. If he'll do that  
15 maybe I'll reconsider, because this is nonsense, Your Honor.  
16 And that's really the point. And I want to nip this in the bud  
17 now because this is the first of five note cases for entities  
18 owned and controlled by Mr. Dondero, and the same thing is  
19 happening in some of these other cases, Your Honor. It is.

20           And – and if we go down this path, you know you're the  
21 Judge, you make the call, but we're going to be having a lot of  
22 these because I'm not volunteering putting my client through  
23 this process. It's not right. It's just not right.

24           He made an oral agreement with himself? Please. You  
25 either violated the automatic stay or you partially performed,

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1 thereby proving it never happened. Mr. Aigen says, oh, we  
2 contest it. We don't sit here and contest it. The proof is in  
3 the record. The proof is his client's own words. The proof of  
4 the documents that we've already put before the Court. (Briefly  
5 garbled audio) – never happened.

6 And I just – I just want to nip this in the bud.  
7 That's really our point, Your Honor. To put forth a client in –  
8 in a notes action, the simplest form of action there could  
9 possibly be, to answer questions on 13 different topics, but  
10 there's a limit to what we'll do, and this is our limit. And  
11 that's why we won't – we won't do it in the absence of a court  
12 order.

13 THE COURT: Okay.

14 MR. MORRIS: Thank you, Your Honor.

15 THE COURT: All right. So I will give the last word  
16 to you, Mr. Aigen. What would you like to say in rebuttal?

17 All right. You must be on mute.

18 MR. [SPEAKER]: He's on mute.

19 MR. AIGEN: Sorry.

20 THE COURT: Okay.

21 MR. AIGEN: A few quick points, Your Honor. Number  
22 one, counsel has referred to New York procedure on how he could  
23 file a quick summary judgment. Well, he can file summary  
24 judgment here too. They didn't do it. These defenses are  
25 pending, we have a right to take discovery on it. I think

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1 that's pretty straightforward.

2           Number two, counsel has repeatedly stated, as he  
3 states in his pleading, that we changed our position and that  
4 first answer it said that the notes were forgiven. It doesn't  
5 say that. I'm reading from their pleading at paragraph 16 where  
6 they quote our answer, the original one where it says,  
7 "Defendant asserts that plaintiff's claim should be barred  
8 because it was previously agreed by plaintiff that plaintiff  
9 would not collect on the note." There's no change in the  
10 position. It wasn't asserted before these notes were actually  
11 forgiven, so that's just not true, and his own pleadings reflect  
12 that.

13           We also heard a lot of conversation about what we have  
14 given them. We have answered their interrogatories. They  
15 didn't ask about other people who may have loans forgiven. They  
16 had never asked about that. That's why we haven't told them.  
17 They could get that information. They could serve discovery.  
18 They're the one that wanted this case on a fast track. So keep  
19 talking about discovery or answers he doesn't have because those  
20 are answers to questions he never asked. There is no discovery  
21 out there where they said to us identify the individual who you  
22 believe received loans that are forgiven. They never asked  
23 that. That's why they don't –

24           THE COURT: Let me –

25           MR. AIGEN: – that answer, so I don't think that's

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1 right.

2 THE COURT: Let me ask you this. If Bank of America  
3 loaned money to Mr. Dondero and he defaulted and they sued him  
4 on the note, do you think Mr. Dondero could get discovery  
5 regarding all other borrowers or any other borrower that Bank of  
6 America may have lent money to and did they forgive some of  
7 their indebtedness, did they have special arrangements? Do you  
8 think in a million years a state court judge would allow  
9 discovery on this?

10 MR. AIGEN: Not under that hypothetical, but I would –  
11 what I would say, Your Honor, if there was an oral condition as  
12 part of that loan and it turns out that everyone knew that Bank  
13 of America provided those same oral conditions to a subset other  
14 group of lenders – or borrowers, for whatever reason, and the  
15 parties disputed that, then I think it would be discoverable.  
16 So I think the situation here is –

17 THE COURT: Oral agreements –

18 MR. AIGEN: – different from your situation. I agree  
19 with the hypothetical.

20 THE COURT: I mean again I – you know, oral  
21 agreements. I mean give me examples of case law where oral  
22 agreements somehow prevailed at the end of the day. I mean I  
23 just...

24 MR. AIGEN: And, Your Honor, at summary judgment, when  
25 we have to present our case, we'll present our case. Like I

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1 said, they could have filed the summary judgment on day one,  
2 just like they could do in New York, and said, you know, on the  
3 defenses, but we're doing this and we're doing it on a fast  
4 track obviously with trial in less than two months. So this is  
5 our one opportunity to get discovery. And when they filed their  
6 summary judgment, we'll respond with the law. But until they  
7 do, for whatever reason they have waived it. They have told you  
8 that it would be burdensome to allow him to answer a few other  
9 questions. I don't — for one thing, burden was not an objection  
10 they made, so he's talking about how it's burdensome and he  
11 doesn't want to do it. But this is our one opportunity to get  
12 this information. And if they file summary judgment, and, you  
13 know, these defenses go away, obviously it won't be an issue  
14 later, but this is our one opportunity to get this discovery.

15 THE COURT: Okay.

16 MR. MORRIS: Your Honor, if I may? Just one last  
17 point. There is zero chance, zero chance that if any loan was  
18 ever forgiven by the debtor that it was on the same terms on  
19 which Mr. Dondero now claims his loan would be forgiven or  
20 deferred. And how do I know that? Because if you look at his  
21 response to the interrogatory, the condition subsequent, by  
22 them. And Mr. Aigen is just wrong, he did change his answer.  
23 His original answer was that he wouldn't have to pay. And then  
24 his new answer, his amended answer is that he wouldn't have to  
25 pay until a condition subsequent. And when we asked him what



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1 that condition subsequent was, it was the liquidation of certain  
2 assets. Since the liquidation of those assets has not been  
3 completed, by definition, no other maker could have had a note  
4 or an oral agreement or an agreement of any kind of the type  
5 that Mr. Dondero has. So yet another reason why it fails to  
6 meet the burden, they fail to meet the burden under Rule 26.  
7 Nobody could have ever had the same note forgiven or agreement,  
8 because the condition subsequent hasn't been met yet.

9 THE COURT'S RULING ON THE MOTION TO COMPEL

10 THE COURT: All right. Well, I'm going to deny the  
11 motion to compel. I don't think that the burden has been met to  
12 establish the relevance of these, I guess it's - one, two,  
13 three, four, five - six topics that are now at issue, topics 9,  
14 14 through 17, or 20, and, you know, I don't think the  
15 proportionality standard is met here.

16 I do think it would be not proportionate to the needs  
17 of the case for the CEO, who came in place in 2020,  
18 postpetition, two years after these notes were executed, to have  
19 to go do research about any loans made by Highland to any  
20 officers and employees over the years and, you know, I don't  
21 know who he's going to question, what policy he is going to look  
22 into that might be some substance or evidence as to oral  
23 agreements or forgiveness. I don't think he should have any  
24 obligation to search files and interview people to figure out  
25 what the affirmative defenses and Mr. Dondero are all about or

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1 based in. And, again, no one would have better information  
2 about his own compensation than Mr. Dondero himself.

3 I mean I want to stress that this comes against a  
4 backdrop of – well, it seems like some antagonism, to say the  
5 least, on the part of Mr. Dondero where Mr. Seery's concerned.  
6 It seems like it's always a fight with Mr. Seery. And you say,  
7 well, we didn't handpick him as the 30(b)(6) witness, but, you  
8 know, the motion to compel names him by name. It just – it  
9 feels like another antagonistic move.

10 You've got him for a deposition next Monday on 13 or  
11 so different topics. I think it is appropriate to draw the line  
12 on these six or so topics that again just don't seem relevant or  
13 proportional to the needs of the case.

14 All right. So, Mr. Morris, would you please upload  
15 just a simple order reflecting the Court's ruling?

16 MR. MORRIS: I would be happy to, Your Honor.

17 THE COURT: Okay. Actually I'm going to ask Mr. Aigen  
18 to do it. I'm sorry. I need to be thinking about attorney's  
19 fees and who should bear the costs of what.

20 So, Mr. Aigen, would you please electronically submit  
21 an order?

22 MR. AIGEN: Yes.

23 THE COURT: All right. Thank you.

24 All right. Well, if there's nothing else on this  
25 particular adversary, let me just double check. Any

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1 housekeeping matters before I move onto the other adversary?

2 MR. AIGEN: Not from the debtor, Your Honor.

3 MR. CLUBOK: Your Honor, -

4 THE COURT: All right.

5 MR. CLUBOK: I don't know if you're about to move on.

6 Your Honor, can you hear me?

7 THE COURT: I'm sorry, Mr. Clubok?

8 MR. CLUBOK: Your Honor, -

9 THE COURT: Were you weighing in on -

10 MR. CLUBOK: Yeah, I'm - I'm sorry. It's not about  
11 that proceeding, but are you about to move on beyond - beyond  
12 the Highland matters?

13 THE COURT: No, no, no.

14 MR. CLUBOK: There was another Highland matter -

15 THE COURT: I was next - I was next going to go to the  
16 other adversary, the dispute between the committee and seven or  
17 so defendants. And, yes, I know we have UBS I guess all day  
18 tomorrow unless anything has changed. So we'll - we'll hear  
19 before we're done any previews about tomorrow.

20 All right, so moving on -

21 MR. CLUBOK: Thank you.

22 THE COURT: - the Committee versus CLO Holdco,  
23 20-3195. We have a committee motion to basically stay the  
24 adversary proceeding for 90 days. So I will get lawyer  
25 appearances on that.

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1 Who do we have appearing for the committee, the  
2 movant?

3 MS. MONTGOMERY: Yes, Your Honor. Paige Montgomery  
4 for the committee.

5 THE COURT: All right. And for the defendants, who do  
6 we have appearing?

7 MR. PHILLIPS: Good morning, Your Honor. Louis M.  
8 Phillips on behalf of Highland Dallas Foundation and CLO Holdco  
9 Ltd., along with my associate Amelia Hurt.

10 THE COURT: All right. I saw your –

11 MR. DRAPER: Good morning, Your –

12 THE COURT: – pleading filed at 9:00 something last  
13 night.

14 Any other defendant appearances?

15 MR. KANE: Yes, Your Honor, –

16 MR. DRAPER: Yes, Your Honor. Douglas Draper on  
17 behalf of the Dugaboy Investment Trust –

18 THE COURT: All right. Thank you.

19 MR. DRAPER: – and Get Good.

20 THE COURT: Oh, okay. Thank you.

21 Other appearances?

22 MR. KANE: Yes, Your Honor. John Kane on behalf of  
23 Grant James Scott, III.

24 THE COURT: Okay. Mr. Kane, your volume was very low.  
25 You're – you're Mr. Scott's counsel as trustee for these trusts?

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1 MR. KANE: In – in a sense, Your Honor, and in his  
2 individual capacity. I no longer represent CLO Holdco.

3 THE COURT: Okay. I don't know if you got that at  
4 all, Michael. It was so faint.

5 THE REPORTER: Yeah, I got a little of it, but it –

6 THE COURT: Okay. you're no longer representing CLO  
7 Holdco, Ltd., but you're representing Grant Scott in his trustee  
8 capacity for these two trusts?

9 MR. KANE: Your Honor, Grant Scott is no longer the  
10 acting director or trustee of CLO Holdco, but he was a named  
11 defendant in this action based on his time as trustee or  
12 director of CLO Holdco, and I represent him in that capacity.

13 THE COURT: Okay. Any other defendant appearances?

14 MR. ASSINK: Good morning, Your Honor. This is Bryan  
15 Assink for Mr. Dondero.

16 THE COURT: Okay. Any other appearances?

17 All right. Well, Ms. Montgomery, you may make your  
18 argument.

19 MS. MONTGOMERY: Thank you, Your Honor. And thank you  
20 for taking the time to consider our motion so quickly.

21 I'd like to just briefly address how we plan to  
22 proceed today. To make more time, we'd like to give a brief  
23 opening statement. I'm not sure who among the defendants  
24 intends to be heard specifically today in opening, but at the  
25 conclusion of that we would like to proceed to testimony. We

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1 have Mr. Kirschner, who you can see on the screen, Your Honor,  
2 and he's here today. We plan, for efficiency sake, to put him  
3 on by proffer to the extent that that is acceptable to the  
4 Court. And then he will be available to answer any questions  
5 that the Court or the defendants may have.

6 THE COURT: All right.

7 MS. MONTGOMERY: As you can see in our motion, we're  
8 requesting a 90-day stay of the adversary proceeding. And the  
9 purpose for that stay is to allow Mr. Kirschner and his firm,  
10 Teneo, the time they need to get up to speed on this case.

11 Stepping back for a moment, it was always the  
12 committee's intention have these claims prosecuted by the  
13 ultimate litigation trustee. However, due to a disagreement  
14 about certain funds that are held in the Court's registry, the  
15 clock started ticking on the committee's time to bring this  
16 adversary proceeding. So but for the order that the committee  
17 commenced an adversary proceeding by a date certain, this action  
18 would have been brought at a later time by a litigation trustee  
19 post effective date as part of a comprehensive litigation  
20 strategy related to all estate claims.

21 For a variety of reasons the effective date of the  
22 plan has been repeatedly delayed, which has necessarily delayed  
23 the formation of the litigation subtrust. We're coming up on  
24 two years since the filing of the bankruptcy proceeding and  
25 there's limited time available for the trust to be formed and

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1 the trustee to develop a comprehensive litigation strategy.

2 As the Court may have noted, as we are wrapping things  
3 up, two of our four committee members have also recently  
4 retired/withdrawn from the committee. So as a result last  
5 Friday, the committee filed an application –

6 THE COURT: Just inquiring minds want to know. I mean  
7 did they – did they by chance sell their claims or they just  
8 were tired of the committee role?

9 MR. CLEMENTE: Your Honor, if I may? It's Matt  
10 Clemente. I'll just jump in on that, Your Honor, –

11 THE COURT: Um-hum.

12 MR. CLEMENTE: – very quickly. I don't know how  
13 anybody could be tired of being on the committee, but the answer  
14 is, Your Honor, that they both sold their claims and  
15 claim-transfer notices have been placed on the docket. The  
16 United States Trustee is aware and the trustee's position at  
17 this point is to keep the committee at the two members, which  
18 are Meta E and UBS, as we continue forward here through the case  
19 and hopefully to an effective date in the near future.

20 THE COURT: All right. Thank you.

21 All right. Ms. Montgomery, continue.

22 MS. MONTGOMERY: Thank you, Your Honor.

23 So as a result, last Friday the committee filed an  
24 application to retain Mr. Kirschner and his firm as litigation  
25 advisor to the committee until the plan goes effective and the

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1 litigation subtrust is formed. At that point Mr. Kirschner will  
2 become the litigation trustee under the plan and he'll be  
3 responsible for all claims brought seeking recovery on behalf of  
4 the estate. So obviously under the terms of the plan, our  
5 client, the committee, will cease to exist at that point and  
6 responsibility for the adversary proceeding that we're currently  
7 being heard in will pass to the litigation trustee. And there  
8 will be a new oversight committee, which has not been formed yet  
9 either as of the effective date.

10 So because this adversary proceeding will transfer to  
11 the litigation subtrust upon the effective date of the plan,  
12 it's imperative that Mr. Kirschner be involved in the  
13 prosecution of the adversary proceeding immediately and the  
14 development of legal strategy for all of the estate claims as a  
15 whole. For a number of reasons, the 90-day stay of the  
16 adversary proceeding will provide Mr. Kirschner with the  
17 necessary time he needs to get up to speed.

18 Mr. Kirschner needs to familiarize himself with the  
19 Byzantine structure of the debtor and the relationships among  
20 the debtor and its thousands of related entities and insiders.  
21 The corporate structure, as you have noted on several occasions,  
22 is highly complicated. And the ownership and beneficial  
23 ownership of entities is confusing enough even before you  
24 consider the variety of transfers of estate assets between and  
25 among those entities – entities. We've heard these



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1 relationships described as tentacles. I tend to think of them  
2 as a web, and the allegations of this adversary proceeding  
3 represent only a small section of strands.

4 Mr. Kirschner also needs time to familiarize himself  
5 with the pending motions to withdraw the reference and the  
6 motions to dismiss, and to develop the strategy which could  
7 significantly change the trajectory of the adversary proceeding  
8 and future adversary proceedings. Mr. Kirschner's decisions  
9 regarding how to respond to these motions may change the course  
10 of the litigation in ways that are material to the pending  
11 motions. For example, he could determine to amend the complaint  
12 or he could bring additional claims that the committee does not  
13 have standing to bring on its own. For example, breach of  
14 fiduciary duty. Importantly, there could be arguments  
15 surrounding the motion to withdraw the reference and have  
16 impacts on the other actions that may be brought by Mr.  
17 Kirschner in his role as litigation trustee.

18 The strategy surrounding plaintiff's response to the  
19 motion to withdraw the reference may also depend on facts that  
20 have not yet been developed. Mr. Kirschner should be given at  
21 least some time to develop that strategy.

22 It's also worth noting that the notice period on Mr.  
23 Kirschner's retention application does not end until June 7th,  
24 which is after the current hearing date for the motions to  
25 withdraw the reference, which are set for June 3rd. Given his

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1 proposed role as litigation advisor and his future role as  
2 litigation trustee, he will be responsible for this adversary  
3 proceeding, he should be involved in the strategy to oppose the  
4 motions to withdraw the reference.

5 As you know, Your Honor, the Highland entities have an  
6 extremely complex structure involving obscure relationships and  
7 ownership structures. Mr. Kirschner not only has to get up to  
8 speed with those facts, but he also needs to wrap his hands  
9 around the transfer of information obtained from both the debtor  
10 and the committee over the course of these proceedings. So this  
11 adversary proceeding is just one part of the complexity that is  
12 the estate claims, but it's an important part and he should have  
13 time to ensure that he's proceeding in the most efficient way  
14 and in the way that's best for the debtor's estate.

15 In addition to needing to get up to speed on the facts  
16 giving rise to this case, Mr. Kirschner is also – will be  
17 working on a comprehensive strategy for all estate claims. As  
18 pointed out in the response that was filed last night, since he  
19 is familiar with the adversary proceeding, obviously, we filed  
20 it, and we did so after tedious review of thousands of  
21 documents, and it took us months to put together a picture of  
22 the transactions that are underlying the complaint, and those  
23 months were after we had been actively involved in these  
24 proceedings for over a year, so it's a very complicated –  
25 there's some pretty complicated stuff going on there.

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1 We also believe that we provide competent  
2 representation, which is at least tangentially challenged in  
3 that response, but we're the lawyers that represent the  
4 committee. We're not the party that's responsible for the  
5 decisions of the underlying management of the litigation.  
6 Obviously lawyers take direction from their clients and ours as  
7 of the effective date will no longer exist, and Mr. Kirschner  
8 will be the person who's responsible for making those decisions.

9 So to put it slightly differently, we may be driving  
10 the car but we're not deciding, you know, where the car is  
11 going. That's the client's decision.

12 I am at least somewhat offended by opposing counsel's  
13 implication that the motion to stay was brought in bad faith  
14 because it smelled that there might be some litigation  
15 advantage. All I can do in response to that, Your Honor, is  
16 assure the Court that the stay is not being sought for such a  
17 purpose. To the extent that there's any gamesmanship occurring  
18 in these proceedings, it's not us that's engaging in it.

19 Mr. Kirschner is entitled to gain his own  
20 understanding of the issues underlying this adversary and of the  
21 litigation landscape as a whole, and to have an orderly  
22 transition of responsibilities from the committee, the debtor,  
23 and counsel for both before he's asked to make important  
24 strategic decisions that could have long-lasting implications on  
25 his work.

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1           In short, Your Honor, there is no rush to have the  
2 pending motions heard and no prejudice to defendants by a stay  
3 of proceedings. As they point out in their response, the Court  
4 has delayed the hearing on the motion to dismiss until after  
5 consideration on the motion to withdraw the reference.  
6 Additionally, as they make clear in their response, discovery is  
7 not underway at this point. We still haven't effectuated  
8 service as to all defendants. We have some defendants that are  
9 foreign entities and we're still working through the service of  
10 process. We're not entirely sure how much longer that's going  
11 to take, but it has proven to be a lengthy process to date, and  
12 we don't really have an estimated time for when that will be  
13 done. So, if anything, there is an ideal time for a pause on  
14 proceedings that won't prejudice any party.

15           The only purported harm our opponents have identified  
16 is the delay itself, and I have to admit, Your Honor, that this  
17 is the first time I've ever heard a defendant argue that they're  
18 prejudiced by litigation against them not proceeding. In fact,  
19 we reviewed the cases that are cited in the response that  
20 purport to support a right of good – to a determination of  
21 rights and liabilities without undue delay. Unsurprisingly,  
22 both involve instances of a defendant seeking to delay  
23 prosecution of a plaintiff's case rather than the reverse, as we  
24 see here. And in those cases, the stays that were sought were  
25 either indefinite or extremely long. They were not a brief

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1 90-day extension of the sort recognize requested here. There's  
2 simply no prejudice to the defendant in the adversary by staying  
3 the proceeding for 90 days.

4 On the other hand, the 90-day stay of the adversary  
5 proceeding will provide Mr. Kirschner with the time that he  
6 needs to develop an understanding of this adversary proceeding  
7 and the litigation strategy as a whole. And moving forward  
8 without the stay may very well prejudice the future litigation  
9 subtrust and harm the debtor's estate.

10 That's all I have for now, Your Honor.

11 THE COURT: All right. A couple of questions. You  
12 said there's been no service on certain defendants, and I know  
13 that certain of these defendants are said to be Cayman Island  
14 entities, these various Charitable – Charitable Daf (phonetic),  
15 maybe CLO Holdco Ltd, Charitable Daf Fund, those three in  
16 particular, right, right foreign entities? Okay, so they have  
17 gone –

18 MS. MONTGOMERY: Yes, Your Honor.

19 THE COURT: – they have not – those are the three, I  
20 presume, that have not been served?

21 MS. MONTGOMERY: CLO Holdco has been served, the  
22 others have not.

23 THE COURT: Okay, okay. Thank you. I'm sorry, I'm  
24 getting a little mixed up. So there's been money in the  
25 registry of the Court and I remember that was why early on I

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1 sort of created a quick time table for you all getting this  
2 filed. How much money is still in the registry of the Court? I  
3 remember there were agreed orders that some of it could be paid  
4 over, I think, to Mr. Rocatta (phonetic). I can't remember who  
5 – who all. But is there still a substantial fund in the  
6 registry of the Court without me going online and looking that  
7 up?

8 MS. MONTGOMERY: I'm going to have to look and get the  
9 exact numbers as well, Your Honor, but it's the portion of the  
10 moneys that were purportedly payable to CLO Holdco are still in  
11 the Court's registry.

12 THE COURT: Okay. So it's just that defendant's  
13 funds. And am I also correct that now the debtor ultimately has  
14 a majority interest in CLO Holdco, the debtor itself, because of  
15 that Harbor Vest (phonetic) settlement?

16 MR. PHILLIPS: No, Your Honor.

17 THE COURT: Oh, that's not right?

18 MR. PHILLIPS: I don't think so, no.

19 MR. KANE: Your Honor, this is John Kane. I can  
20 actually provide some clarity on that. The Harbor Vest  
21 acquisition by the debtor's affiliate relates to HCLOF, Highland  
22 CLO Funding, not CLO Holdco. CLO Holdco is the 49-percent  
23 interest owner in HCLOF.

24 THE COURT: Okay.

25 MR. DEMO: And this is Greg Demo, Your Honor, from the

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1 debtor. I can confirm what Mr. Kane just said.

2 THE COURT: Okay, okay. So CLO Holdco is just  
3 strictly in that line of the Charitable Daf and as far as who  
4 owns – who owns it –

5 MS. MONTGOMERY: That is – that's my understanding,  
6 Your Honor.

7 THE COURT: Okay, okay, so I – once again I have  
8 flipped the organizational structure.

9 All right. And then my last question for you, Ms.  
10 Montgomery, is the effective date of the plan has not occurred.  
11 There's obviously an appeal now at the Fifth Circuit, a direct  
12 appeal of the confirmation order. Is there still a stay pending  
13 appeal – a motion for a stay pending appeal pending out there  
14 either at the District Court or Fifth Circuit, or have those  
15 been ruled on one way or the other?

16 MS. MONTGOMERY: Mr. Demo, could you – were you  
17 popping on to answer that question?

18 MR. DEMO: Yes, Ms. Montgomery.

19 This is Greg Demo, Your Honor, from Highland Capital  
20 Management. We still intend to try to go effective after the  
21 hearing on the exit financing, which has been postponed until  
22 June 25th. That's counsel to NexPoint Advisors, and counsel to  
23 Highland Capital Management Fund Advisors filed a motion last  
24 night with the Fifth Circuit seeking a further stay of the – of  
25 the effective date, pending the resolution of their appeal. So

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1 we don't know how that's going to shake out, but the debtor does  
2 anticipate trying to go effective following June 25th.

3 THE COURT: All right. So has there been a stay of  
4 the confirmation order?

5 MR. DEMO: We've agreed to a short administrative  
6 stay –

7 THE COURT: Okay.

8 MR. DEMO: – as all this stuff has been going on. I  
9 believe the administrative stay – actually I can't remember when  
10 it expires, but we have agreed to a short administrative stay.

11 THE COURT: Okay. And so it's –

12 MR. DRAPER: Your Honor, this is Douglas Draper.

13 THE COURT: Okay, go ahead.

14 MR. DRAPER: Just to give the Court some background, –

15 THE COURT: Go ahead.

16 MR. DRAPER: – there were two – you denied the stay  
17 pending appeal. There were two appeals taken from your ruling.  
18 One by myself on behalf of Dugaboy and one by Devor (phonetic)  
19 on behalf of other entities. They both went up to Judge Godbey.  
20 He has never ruled on the stays pending appeal. So what was  
21 done is inasmuch as the motion – the appeal of the confirmation  
22 order is up in the Fifth Circuit, last night Devor filed a  
23 motion for a stay pending appeal in the Fifth Circuit, and  
24 that's pending. So that's the procedural background of what's  
25 gone on.



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1 THE COURT: All right. Thank you, Mr. Draper.

2 All right. Well, I'll hear opening statements from  
3 our defendants. And I ask you please not to be duplicative of  
4 each other. So who wants to go first for the defendants?

5 MR. PHILLIPS: Your Honor, Louis M. Phillips on behalf  
6 of Highland Dallas Foundation and CLO Holdco Ltd. We filed a  
7 response in opposition to the motion to stay. And we are the  
8 ones who, my firm and I, and I'm the one that filed, that sent  
9 messages across to counsel for the committee in response to the  
10 request for consent or notice of opposition. So I guess since  
11 we filed the response we ought to go forward.

12 We have reviewed the – we laid out a time line in our  
13 response. We've laid out communications between counsel and our  
14 response. We laid out what we think the burden is. And we've  
15 laid out the case law that we think establishes the burden for a  
16 stay.

17 What we are concerned about is the – first of all, the  
18 90-day stay, it might even come around as far as further  
19 activity in the lawsuit because we don't know what the Court  
20 would do on June 3rd. We know that the Local Rules require that  
21 – or set forth that the Court will issue a report after the  
22 conference on June 3rd about – to the District Court concerning  
23 the motion to withdraw reference. We filed a motion to withdraw  
24 reference. We filed a first response to the litigation, A, a  
25 motion to withdraw reference; and, B, a motion to dismiss under

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1 Rule 12(b)(6) and a motion for a more definite statement as  
2 well. Both our filings were followed by other defendants who  
3 sought withdrawal of the reference and also dismissal.

4 This Court has pushed aside the motion to dismiss  
5 pending resolution of the – of the motion to withdraw reference,  
6 which we think is entirely appropriate and we're fine with, so  
7 where we are, Your Honor, –

8 THE COURT: And let me – let me just interject there.  
9 That is always 100 percent of the time my practice, and I think  
10 the other bankruptcy judges here. It's out of deference to the  
11 District Court. If the District Court ends up withdrawing the  
12 reference, they may want to say, 'I want to withdraw the whole  
13 darn thing. We don't even want you doing pretrial matters,' so  
14 we don't want to get ahead of them by considering a pretrial  
15 matter. So I did what I do in every case and will take the next  
16 steps –

17 MR. PHILLIPS: And we agree a hundred percent with  
18 that approach, Your Honor. We didn't really know how we were  
19 going to proceed on the motions to dismiss. But we had  
20 deadlines to filing and we got very brief extensions for one of  
21 our clients to file a response to the complaint after service.  
22 On the other client, we didn't get any extension to file a  
23 response. So we filed timely responses and we didn't know how  
24 the Court was going to handle the motion to dismiss. And the  
25 way the Court just handled them is entirely what we – we agreed

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1 that that was the way to do it, because the District Court has  
2 several alternatives if it determines to withdraw the reference.  
3 And we know the courts, we've looked at the Court's Local Rule.  
4 We just don't know how long, and we have no control and we're  
5 fine with having no control over how long the Court would –  
6 would have to take, given its docket, to issue its report to the  
7 District Court. And we have no control over what the District  
8 Court would do.

9 Our problem with the motion for a stay is that we know  
10 that the only things really pending now are motions to withdraw  
11 reference. Those are subject to being brought before Your Honor  
12 at either kind of a hearing/conference where the parties will  
13 put forth their legal arguments and any evidence, but the  
14 evidence will basically be the nature of a litigation and the  
15 situation of the docket. So there's no real factual issues in  
16 dispute. We have a lawsuit, we have a motion to withdraw  
17 reference that's been briefed. We grant an extension of the  
18 response deadline to May 21st in connection with the request by  
19 counsel. And we purposely asked the Court for the June 3rd  
20 date, all with agreement of all counsel. And then two days we  
21 get the emergency motion – or last night, yesterday we get the  
22 emergency motion to stay when the litigation assistant was, in  
23 fact, retained on the day or two after we filed our responses.  
24 And there was no mention in any way, shape, or form of a need to  
25 stay at that time.

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1           So we have one thing pending: Motions to withdraw the  
2 reference. We have reviewed and set forth in our response the  
3 scope of services for which Teneo was being retained. It does  
4 look to us like it is – it looks like litigation support and  
5 litigation analysis.

6           And I hear what counsel for the plaintiff is saying,  
7 but there have been – she's – we agree that there has been  
8 months and months and months of analysis, there have been  
9 millions and millions and millions of dollars spent on U.S. –  
10 UCC counsel fees. They have gone through thousands and  
11 thousands of documents. They came up with this piece of  
12 litigation. This is the one I know about. This is the one  
13 pending before the Court. And there might be – there is a  
14 suggestion that there is an overarching litigation strategy  
15 being employed, but this is what we have right here. And that's  
16 speculation that we have no idea about and we assume the Court  
17 has no idea about.

18           So we have one thing that we want decided and it's  
19 easy for a plaintiff to say – and, look, we're chastised for  
20 being defendants who want to move the lawsuit. One of our  
21 clients didn't even ask for an extension of the deadline to  
22 respond. We have – we asked for one extension for one of  
23 clients. And that extension dovetailed into the response date  
24 for the other client so that we could file a single response for  
25 both clients. That was granted. We appreciate that. And when

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1 the committee asked for an additional time, we granted it with  
2 the proviso that we get the June 3rd date so that if we need to  
3 file a reply, we'd have three or four days to file the reply.

4 We have been – we have not been the ones asking for  
5 any delay and we're not going to ask for any delay. And so I  
6 don't care what other cases say, I don't care what the  
7 plaintiff's lawyer says about defendants always want to delay.  
8 We're not asking for any kind of delay. We want to move  
9 forward. And we think we have the right to figure out and find  
10 out what court is going to be handling our litigation. That's  
11 what we're asking for.

12 We've already said in the communications that we've  
13 listed on our witness and exhibit list that we'll be more than  
14 happy to talk about some type of stay about motions – you know,  
15 discovery, whatever, whatever, if there – if the litigation  
16 advisor needs to get up to speed on what documents are out  
17 there, what documents it would have to review, that's fine.  
18 We're probably going to do some discovery. But we're only going  
19 to discovery if our motion to dismiss under 12(b) are not  
20 granted, because if they are there doesn't need to be any  
21 litigation advice or any analysis about alternatives or  
22 objectives or overarching strategy to deal with the motion to  
23 dismiss under Rule 12(b). That's a legal issue. And the  
24 counsel is very adept – we say counsel's adept. We know they're  
25 adept. That's why we know that they are ready to proceed in

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1 response to our motion to withdraw reference.

2 And then if the District Court takes it after Your  
3 Honor gives her report, then we'll bring the motions, we'll get  
4 with the lawyers for the plaintiff and we'll make – bring our  
5 motion to dismiss before the District Court on some kind of  
6 agreed schedule, but those are legal issues. There is no advice  
7 needed for a motion to withdraw reference. There's no advice  
8 needed for a motion to dismiss under 12(b). Those are legal  
9 questions and – and the idea that Sidley and Austin needs  
10 assistance from an advisor as to how to approach a legal issue,  
11 we don't think is meritorious.

12 So, Your Honor, we have put – we have a witness and  
13 exhibit list of six documents. One is – Document 1 is the  
14 application to employ the Teneo firm. 2 is the – 2, 3, 4, 5,  
15 and 6 are email communications we have provided them. They are  
16 between counsel that are before the Court here today, just to  
17 show that we granted extension for them to respond, then they  
18 ask, and we responded, and so that they were on notice that we  
19 opposed the requested stay. And we would like for the motion to  
20 withdraw reference to go forward.

21 The parties will have plenty of time to work out  
22 discovery, Rule 26 issues, motion for relief – motion to dismiss  
23 under 12(b) in front of whichever court is going to handle it.  
24 Certainly this Court is – if the motion to withdraw reference is  
25 denied, this Court will be in full control of when we have

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1 hearings on the motion to dismiss. And we understand that. So  
2 will the District Court if the District Court grants the motion  
3 to withdraw the reference. The District Court will determine  
4 hearings on the motion to dismiss under Rule 12(b). And then we  
5 have those two things to get past. And those are legal  
6 questions, legal questions that are already before the Court or  
7 already there. So we don't see how additional time is necessary  
8 with respect to that.

9 We think by the time the stay – quote stay expires  
10 we'll have a determination at least on the withdrawal motions.  
11 And we can probably have a setting on the dismissal motions.  
12 And if there – if the plaintiffs survive dismissal, then we'll  
13 have discovery that all litigants will be involved in and  
14 agreeing to and with scheduling orders, et cetera, from whatever  
15 court is going to try this case.

16 And I'd like to say also that once we have – CLO  
17 Holdco has been involved in the bankruptcy case. We recognize  
18 that. I was not the lawyer for CLO Holdco, but I'm representing  
19 CLO Holdco now. The Highland Dallas Foundation has not been.  
20 And the Highland Dallas Foundation is a charitable organization  
21 that has institutional people on the board, has one donor seat  
22 on the board, but it's – it's being sued for twenty something  
23 million dollars. And the idea that it has no interest in  
24 getting this resolved is not correct. It wants to get it  
25 resolved and that's why we're opposing this stay. Thank you,

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1 Your Honor.

2 THE COURT: All right. A couple of follow-up  
3 questions. I'm struggling a bit with the fact that we have a  
4 couple of defendants, two or three defendants that have not even  
5 been served yet. So is it appropriate for this Court to be  
6 going forward on a motion to withdraw the reference when I don't  
7 know what's going to happen with those two defendants. Are they  
8 going to be served? If so, what sort of position are they going  
9 to have with regard to the reference being withdrawn?

10 And, in any event, ultimately I'm going to have to  
11 slice and dice this in a report to the District Court saying,  
12 you know, these entities filed proofs of claim and that may  
13 affect the authority of the Court, you know, maybe it does. I  
14 mean a part of me thinks what's going on here and should we just  
15 wait till they have been served so we have the ability to report  
16 to the District Court: Here is every defendants' position on  
17 this.

18 MR. PHILLIPS: Your Honor, I can't answer the  
19 question. I don't - I mean it seems to me like we have - we  
20 have - CLO Holdco was served. And it is a foreign entity. We  
21 don't know why the other two have not been served. I'm not - we  
22 just don't know. So I mean does that mean if we - I mean we had  
23 to go forward, we had to answer, we had to respond. We had a  
24 deadline to do it. It didn't matter that two hadn't been  
25 served. And so we - you know, if we hadn't responded, given our



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1 service, we would have had a default entered against us and a  
2 request for a default judgment. So I don't know the answer to  
3 the question because I can't imagine that a plaintiff can file a  
4 lawsuit and then the lawsuit was filed months ago and not serve  
5 two people and keep the defendants hung up.

6 I don't know if there is a problem of service. There  
7 was one entity that got served that is a foreign entity. I  
8 don't know why the other ones haven't been served. The Highland  
9 Dallas Foundation was served. The other parties who have  
10 appeared were served. So we have no control over that because  
11 we're not serving anybody. And I would think that the part – I  
12 did some looking in the – in the record and it seems to me like  
13 we don't have – you know, I can't tell you whether we have –  
14 what the arguments would be for the parties who have not been  
15 served.

16 I would assume given that everybody has – my two  
17 clients have filed what they filed. CLO Holdco filed a proof of  
18 claim, but it was in effect disallowed and converted to a claim  
19 for zero. My other client, Highland Dallas Foundation, has not  
20 made any appearance in this case. So all I can say is we think  
21 two – I think the two clients that I'm currently representing,  
22 we know they have been served. We had a deadline to respond.  
23 We have responded. And we think we're entitled to a jury trial  
24 and withdrawal of the reference.

25 MS. MONTGOMERY: Your Honor, if I can answer the

*Adversary 20-3195, Committee's Motion to Stay*

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1 question. CLO Holdco was served through its counsel, whereas  
2 the other two foreign entities require domestication of the  
3 subpoena in the Caymans. And it's our understanding that may  
4 take as long as – just having heard – as another two months for  
5 that process to be complete.

6 THE COURT: All right. My other question I guess is  
7 maybe more rhetorical than something you could really answer. I  
8 – you know – on the one hand, you know, what Ms. Montgomery is  
9 arguing: Our true plaintiff contemplated for this lawsuit isn't  
10 in place yet because the plan hadn't gone effective and, you  
11 know, some – some of the defendants here or affiliates of  
12 defendants are wanting to delay, delay, delay further when the  
13 plan can go effective. You know last night a motion for stay  
14 pending appeal with the Fifth Circuit was filed. So it's like,  
15 no, don't let the plan go forward, let's not get Mr. Kirschner  
16 in place. But, oh, don't issue a stay on this lawsuit. It just  
17 feels a little bit inconsistent, the two positions. What – do  
18 you have anything to say to that?

19 MR. PHILLIPS: I have – all I have to say, all I can  
20 say, Your Honor, and that is CLO Holdco, as I understand it, is  
21 not an appealing party. My other client that's been served,  
22 Highland Dallas Foundation, is not an appealing party. We're a  
23 defendant in – in this lawsuit. And so we don't see – we're not  
24 in a position to be inconsistent about anything. We're not an  
25 appellant. We're not seeking any kind of relief on appeal. And

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1 we – but we are defendants who have been served and who have  
2 filed motions to withdraw reference. So you will have to ask  
3 other people about that. I'm completely consistent in my  
4 position.

5 MR. DRAPER: Your Honor, this is Douglas Draper on  
6 behalf of Dugaboy, who has both –

7 THE COURT: All right.

8 MR. DRAPER: – appealed your decision –

9 THE COURT: Okay.

10 MR. DRAPER: – and has asked for a stay pending  
11 appeal.

12 THE COURT: Okay.

13 MR. DRAPER: It's not an inconsistent position because  
14 two reasons. Number one, you gave the committee authority to  
15 file this suit. The committee took that authority and filed the  
16 suit within the time period. So whether the case is going  
17 forward or – the stay – the case is stayed and the confirmation  
18 order is stayed or not, this action and this entity and this  
19 proceeding is going to go forward.

20 And so all we're talking about here, just so we – it's  
21 all clear, we're just talking about who is going to try this  
22 suit. We're not talking about a master litigation strategy.  
23 We're talking about a location. And, quite frankly, it would  
24 surprise the hell out of me if – if the new person, or whoever,  
25 says, look, I want to go to the District Court.

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1           This is just a location issue, nothing more. You can  
2 sift through each one of these defendants who have been served  
3 as to whether we have a right to a jury trial or not. And each  
4 one, as the Court recognized, is on a – on a defendant-by-  
5 defendant basis. I did file a proof of claim. Whether I have a  
6 right to a jury trial, you're going to have to look at to see if  
7 in fact my proof of claim relates to this claim.

8           Mr. – Mr. Phillips is a defendant set of facts. And  
9 these other defendants may be a different set of facts. So all  
10 we're talking about is location. It is purely procedural. And  
11 I don't think the stay at the district – of the confirmation  
12 order or not is – is in any way impacts this whatsoever. This  
13 is a location question.

14           THE COURT: All right. Any other opening statements  
15 from defendants?

16           All right. Ms. Montgomery, you may put on your  
17 witness. And I'm fine with the proffer, but we'll then swear  
18 him in and see if there cross-examination from the others. All  
19 right, you may proceed.

20           MS. MONTGOMERY: Yes, Your Honor. At this point we'd  
21 like to proffer Mr. Kirschner's declaration that was submitted  
22 in support of our motion for the stay as the content of his  
23 proposed testimony. Mr. Kirschner is obviously here to answer  
24 any questions you have or on cross-examination after he's been  
25 sworn in. And, Your Honor, we would just reserve our right to a

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1 brief redirect should that prove necessary.

2 THE COURT: All right. So I have in front of me the  
3 Declaration of Marc S. Kirschner. It was actually attached to  
4 the committee's motion for stay. It's about four pages long.

5 Let me ask: Are there lawyers who are going to want  
6 to cross-examine Mr. Kirschner?

7 Going once, going twice, no one wishes to  
8 cross-examine him?

9 THE REPORTER: He's on mute.

10 THE COURT: Oh, Mr. Phillips, -

11 MR. PHILLIPS: Your Honor, I'm sorry. I was on mute.  
12 I'm on mute, as I probably already muted, but I was on mute and  
13 I apologize.

14 Your Honor, this - this is - this declaration, there's  
15 no way to cross-examine a declaration that speaks in conclusory  
16 language. The declaration, it was mimicked and mirrors -  
17 mirrors exactly as the party looking into the mirror, not as the  
18 reverse of the party looking into the mirror, argument by -  
19 opening statement by counsel. I would ask a couple of questions  
20 of Mr. Kirschner, please.

21 THE COURT: All right. Mr. Kirschner, I need to swear  
22 you in. Would you speak up, say, "testing one, two."

23 MR. KIRSCHNER: Yes. Testing one, two.

24 THE COURT: All right.

25 MR. KIRSCHNER: Coming through?

*Kirschner - Cross/Phillips*

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1 THE COURT: I – I hear you, I don't see –

2 MR. KIRSCHNER: Okay.

3 THE COURT: There you are. Please raise your right  
4 hand.

5 MR. KIRSCHNER: I can.

6 MARC S. KIRSCHNER, COMMITTEE'S WITNESS, SWORN/AFFIRMED

7 THE WITNESS: I do.

8 THE COURT: All right. Thank you.

9 Mr. Phillips, go ahead.

10 MR. PHILLIPS: Yes, Your Honor. Thank you. Just a  
11 couple of questions.

12 CROSS-EXAMINATION

13 BY MR. PHILLIPS:

14 Q. Mr. Kirschner, in paragraph 7 of your declaration, if you  
15 could find it. Just let me know when you're there.

16 A. I'm there. Thank you.

17 Q. Okay. Thanks. You say that it's important for your firm to  
18 gain an understanding of the complex transactions described in  
19 the adversary proceeding, particularly in connection with the  
20 motion to dismiss and motions to withdraw reference and complex  
21 issues before the Court. What does that mean?

22 A. That means that, as Ms. Paige indicated in her opening  
23 statement and as the Court and all the defendants understand, I  
24 was – when I was designated as litigation trustee in January,  
25 there has been delay after delay after delay in the effective

*Kirschner - Cross/Phillips*

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1 date of the plan, and now we're even at the Fifth Circuit, so  
2 the trust and my role as subtrustee has not yet gone into  
3 effect. Prior to April 15th, I had no access to the debtor, to  
4 the committee, or any of the attorneys, no access through any  
5 protected information. I had no input on the complaint.

6 I became worried as the passage of time went on about  
7 the possible running of statute of limitations later on this  
8 year in October. And it was I who suggested to Mr. Clemente to  
9 come up with what is an extremely unusual procedure, to permit  
10 the committee retain me on an interim basis until the  
11 effectiveness of the trust, and then to flip my work effectively  
12 into the trust.

13 This is very unusual. It's not even yet approved by  
14 the Court. Nevertheless, I and my firm have worked very  
15 diligently since April 15th to get up to speed on this entire  
16 complex factual and legal situation. I cannot just look at the  
17 Holdco adversary in a vacuum.

18 There has been as the Court and all the parties here  
19 know much better than I, there has been ongoing litigation on  
20 many fronts for quite a long time. There has been supplied a  
21 Byzantine web of some 1400 entities -

22 MR. PHILLIPS: Your Honor, Your Honor, -

23 THE WITNESS: - to accomplish -

24 MR. PHILLIPS: Your Honor, could I interrupt? He  
25 needs to answer the question.

*Kirschner - Cross/Phillips*

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1 BY MR. PHILLIPS:

2 Q. What does – what does – what does the understanding about  
3 the motion to withdraw reference mean? What do you need to get  
4 up to date on the motion to withdraw reference?

5 A. I'm responding to your question.

6 THE WITNESS: If I may, Your Honor, I'm responding to  
7 the question. I'm almost done –

8 MR. PHILLIPS: Your Honor, a narrative, a preexisting  
9 narrative –

10 THE COURT: Ah, –

11 MR. PHILLIPS: We just – I just want to know. We have  
12 legal issues.

13 THE COURT: Okay, I sustain the objection –

14 MR. PHILLIPS: I want to know what he –

15 THE COURT: If you could reask the question and we'll  
16 see if we can get an answer –

17 MR. PHILLIPS: All right. I'll reask the question,  
18 Your Honor. I'm sorry. I apologize.

19 Your Honor, I'm going to withdraw any questions. I'm  
20 – this is – this is going to turn into just an argument. His  
21 declaration and conclusory and it's just going to be more  
22 conclusion. So I'm – I'm willing to argue from his declaration  
23 in closing.

24 THE COURT: All right. Any other questions?

25 No other –



*Kirschner - Redirect/Montgomery*

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1 MR. DRAPER: None, Your Honor, from Dugaboy.

2 THE COURT: Okay. Anyone else?

3 Ms. Montgomery, do you have any redirect on that brief  
4 cross?

5 REDIRECT EXAMINATION

6 MS. MONTGOMERY: Yes. I think, Your Honor, I would  
7 just ask if there is anything else that Mr. Kirschner feels the  
8 Court should be aware of before reaching a decision on today's -  
9 on today's motion?

10 MR. PHILLIPS: Your Honor, we object to that question.  
11 That's not even a question.

12 THE COURT: I overrule. He can answer.

13 THE WITNESS: Okay. Thank you very much, Your Honor.

14 As I was saying, there is a Byzantine web here of over  
15 1400 entities, many moving intertwined parts. I have literally  
16 and my firm has literally had to triage the monumental amount of  
17 work that is necessary to get my hands on this overall  
18 situation. There's allegations that money's been flying all  
19 over the world -

20 MR. PHILLIPS: Your Honor, this is not - this is not  
21 appropriate testimony. This is - that's hearsay. There's  
22 allegations all - money flowing all over the world. This is -  
23 this is a narrative that has nothing to do with the pending  
24 motion to withdraw reference and is, in essence, an  
25 assassination piece. This is - what we -

*Kirschner - Redirect/Montgomery*

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1 THE COURT: I overrule. He's trying to explain why he  
2 needs 90 days at bottom here, so I think it's relevant.

3 MR. PHILLIPS: Well, the long -

4 THE COURT: And I understand everything's an  
5 allegation subject to evidence.

6 MR. PHILLIPS: Well, we're talking about  
7 allegations, -

8 MR. [SPEAKER]: Right.

9 MR. PHILLIPS: - we're talking about - we just heard  
10 they're allegations about money flying all over the world.  
11 That's not an acceptable testimony. You know that and everybody  
12 on this call knows that. That's absolute abject hearsay and the  
13 idea that you could - you could buttress a motion for stay after  
14 you've had 30 days to review a legal analysis about a motion to  
15 withdraw reference, because there are allegations of money  
16 flowing all over the world is ridiculous. Your Honor, we - we  
17 firmly and in this way object -

18 THE COURT: Overruled. I understand you don't like  
19 the emotional, if you want to call it, emotional language. You  
20 think it's hyperbole, you think it's hearsay, but he didn't - he  
21 didn't offer an out-of-court statement. He's just saying the  
22 allegations - you know, they're in pleadings, they're  
23 allegations in many different adversaries, and so I overrule the  
24 objection.

25 You can complete your answer, Mr. Kirschner.

*Kirschner - Redirect/Montgomery*

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1 THE WITNESS: Thank you very much, Your Honor.

2 All of these complexities in my view potentially  
3 impact on the motions to withdraw. I recently realized that I  
4 cannot properly perform my fiduciary duty to all creditors by  
5 the deadline for a response to the motion to withdraw and the  
6 motions to dismiss. I am in fact considering potential  
7 amendments to the existing Holdco adversary to possibly other  
8 issues that may impact the withdrawal motion.

9 Your Honor said this morning that it's important to  
10 take into consideration both procedural and substantive matters.  
11 I am worried about potential impacts of whatever I do. And bear  
12 in mind, as Ms. Paige indicated, I am - (brief garbled audio) -  
13 no process plan. All of this was supposed to have been put in  
14 the litigation trust under my auspices. I am now litigation  
15 advisor, not yet approved by the Court. It is the client, I,  
16 who direct, after consultation, all strategy by lawyers.

17 I have a long history, as Your Honor has seen from my  
18 C.V., of directing complex billions of dollars of litigations.  
19 I rely on lawyers, but I am very involved in every aspect of the  
20 case. This is very confusing, not just the CLO Holdco itself  
21 but the entire complexity of all of the potential matters here  
22 that I need to study in a very short period of time. I'm  
23 concerned that dealing just with this in this couple of days is  
24 going to be harmful to creditors ultimately and respectfully  
25 request the Court to grant the 90-days adjournment.

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1           Maybe I'm being overly cautious and I apologize for  
2           that, but I feel strongly about my fiduciary duty and want to do  
3           the best I can to understand everything that's going on before  
4           we have to respond both to the withdrawal motion and the motion  
5           to dismiss. So thank you, Your Honor.

6           THE COURT: Thank you.

7           Anything else, Ms. Montgomery, as far as examination?

8           MS. MONTGOMERY: No, Your Honor. I have no further  
9           questions.

10          THE COURT: All right. Mr. Phillips, or anyone else,  
11          any recross on that redirect?

12          No? All right. Thank you.

13          All right. This —

14          MR. PHILLIPS: No, Your Honor. I muted myself again.  
15          No, Your Honor.

16          THE COURT: Okay. Is that all of the evidence you're  
17          going to present, Ms. Montgomery?

18          MS. MONTGOMERY: It is, Your Honor.

19          THE COURT: All right. Well, I'll turn to our  
20          objectors —

21          MR. PHILLIPS: We —

22          THE COURT: I'm sorry?

23          MR. PHILLIPS: We'd like the enter and offer — we'd  
24          like to offer and introduce our exhibits that we put on our  
25          witness and exhibit list, Your Honor.

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1 THE COURT: Okay.

2 MR. PHILLIPS: And we've submitted them to the Court,  
3 Exhibit 1 through 6, as itemized in our witness and exhibit  
4 list.

5 THE COURT: All right. This is Docket Number 52 in  
6 the adversary, correct?

7 MR. PHILLIPS: Yes. Yes, ma'am.

8 THE COURT: All right. So let me pull it up here.  
9 Okay, we've got the application to employ Teneo and different  
10 emails.

11 Any objection, Ms. Montgomery, to this?

12 MS. MONTGOMERY: I have no objection to Exhibit 1,  
13 Your Honor, the application, and obviously it's a pleading that  
14 we filed. I have questions about the relevance of the other  
15 exhibits, but I have no objection to their admission. They're  
16 emails that went back and forth between the parties.

17 THE COURT: All right. Well, do you want to address  
18 that relevance? I'm not sure if it was an objection or – was it  
19 an objection ultimately? Was it –

20 MR. PHILLIPS: I didn't hear an objection, Your Honor.

21 THE COURT: Ms. Montgomery.

22 MS. MONTGOMERY: Your Honor, for purposes of today's  
23 hearing, I have – I have no concerns about their admission for  
24 your consideration.

25 THE COURT: Oh, okay, so –

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1 MS. MONTGOMERY: We're not contesting the history of  
2 the back-and-forth between the parties.

3 THE COURT: Okay. I will admit 1 through 6.

4 (Defendants' Exhibits 1 through 6 received in evidence.)

5 THE COURT: All right. Any – any other evidence from  
6 our defendants?

7 MR. PHILLIPS: No, Your Honor.

8 THE COURT: All right. Well, anything in the way of  
9 closing argument? Ms. Montgomery, you are the movant. You go  
10 first.

11 MS. MONTGOMERY: Yes, Your Honor, just very briefly to  
12 address a couple of points. First of all, I think that there's  
13 been some sort of misconstruing of Mr. Kirschner's role as the  
14 litigation advisor and ultimately the litigation trustee. He –  
15 functionally, the litigation advisor – we're in a very unique  
16 situation here.

17 The parties never expected that the effective date  
18 would be delayed in the way that it has been. We're coming up  
19 on the two-year anniversary of the filing of the proceedings.  
20 There are a number of claims that need to be investigated and  
21 decisions made about how they will be pursued in the next couple  
22 of months. And so this litigation advisor role, as Mr.  
23 Kirschner testified, is somewhere unique in that we're trying to  
24 work around the constraints that have been created by the way  
25 that these proceedings have moved forward.

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1           The litigation advisor is really functionally a proxy  
2     for the role that Mr. Kirschner will have upon the effective  
3     date of the plan as litigation trustee. He's not acting in the  
4     capacity of a law firm or like and FTI or a DSI, or any of the  
5     other professionals that have been specifically retained in the  
6     bankruptcy to date because the role isn't the same traditional  
7     role. Right, he is functioning in a way that will allow him  
8     access that he needs to the data to get up to speed to make the  
9     decisions that have to be made so that he can, you know, proceed  
10    in the way that is best for meeting his fiduciary duties to the  
11    ultimate litigation subtrust.

12           So to the extent that there is any sort of argument  
13    that, you know, he – that his role is duplicative or any of the  
14    other things that we've heard today or that we've seen in the  
15    response, I think that those are just a misunderstanding of what  
16    he will actually be doing. He is going to be the client, Your  
17    Honor. He is not going to be the lawyer.

18           The other thing I think that we talked about a bit is,  
19    you know, this argument that Mr. Kirschner has been involved in  
20    the case since April 15th and therefore he's had plenty of time  
21    to understand everything that he needs to know to be able to  
22    move forward. Technically, Your Honor, I think it goes without  
23    saying he's not officially retained until after the return date  
24    on the motion to withdraw. And even so, just based on the years  
25    now that we've spent in this case, I can – I can argue to you

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1 and I think Your Honor will feel the same way, there's too much  
2 learn in that short a time period to be able to say that you are  
3 proceeding in the way that is going to be best for the estate in  
4 that short timeframe.

5 We're working to get Mr. Kirschner up to speed, the  
6 debtor is working to get Mr. Kirschner up to speed, but there is  
7 a lot that has happened here and that continues to change on a  
8 daily basis, including the stay that was filed just last night.

9 And then, finally, Your Honor, I would argue that  
10 there has been no harm established by virtue of the stay. And,  
11 in fact, all of the things we've heard today established the  
12 fact that there may be harm if the stay is denied. So, for  
13 example, Your Honor you know very correctly pointed out that we  
14 have two international defendants who haven't even appeared at  
15 this proceeding yet, right. We may not effectuate service for  
16 another two months. It may be another 60 of these 90 days that  
17 we're requesting for a stay may be required just to get them  
18 properly served and into this proceeding.

19 And, you know, I agree, Your Honor, that there may be  
20 issues that surround those two defendants that, you know, we  
21 won't be able to take into consideration until they're properly  
22 here in the Court and able to file their own motion to withdraw,  
23 if that's what they want, or state their position with regard to  
24 it.

25 You know, Your Honor, moreover, there is a lot going



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1 on here and Mr. Kirschner does realistically need time to be  
2 able to develop his approach and make decisions about whether or  
3 not there will be amendments to the complaint that could impact  
4 the motion to withdraw. He needs to make decisions about other  
5 claims that may be brought. There are a lot of moving parts.  
6 It's a unique situation. And we would urge the Court to allow  
7 him the time that he needs to be able to effectuate his duties  
8 in the way that he sees fit.

9 THE COURT: And I know I have it right in front of me,  
10 but the employment application for Mr. Kirschner and his firm to  
11 potentially be litigation advisor until the plan goes effective,  
12 when is that set for hearing?

13 MS. MONTGOMERY: It's set for June 7th, Your Honor,  
14 and the motion to withdraw is currently set for June 3rd. And  
15 that – that motion to retain Mr. Kirschner was only filed on  
16 Friday of last week, and our motions that you're hearing today  
17 were filed on Tuesday.

18 THE COURT: Okay.

19 MS. MONTGOMERY: So it's a very short delay of time  
20 between the two.

21 THE COURT: All right. I'll hear other closing  
22 arguments.

23 MR. PHILLIPS: Your Honor, thank you. As far as harm,  
24 we have one – we have one client, Highland Dallas Foundation,  
25 who has made no appearance in this case, as has very – and

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1 assume they're being sued for \$24 million, and that's not a  
2 problem.

3 Under the argument structure we're hearing today, we  
4 could never really get until a plaintiff has said, 'I have no  
5 further ability to amend the complaint,' a hearing on a motion  
6 to withdraw reference. Look, we didn't file the complaint. The  
7 complaint was filed four or five months ago. And very able  
8 counsel looked, and as counsel has argued, has looked at  
9 thousands and thousands of documents, have been paid millions  
10 and millions of dollars for its work, and it came up with this  
11 lawsuit that was filed – I've forgotten the filing date, but it  
12 was filed at least four and a half months ago, January of this  
13 year I believe. Ms. Montgomery – counsel for plaintiff can say  
14 the exact date.

15 But we've got two defendants who haven't been served,  
16 but I've got one – I've got two that have been served. And we  
17 have established a basis upon which we can get – we have a right  
18 to a jury trial and a right to withdrawal of the reference. And  
19 that motion has been filed. And the idea that I'm going to  
20 bring – I'm going to change clients – and it's really  
21 complicated. After we've done millions and millions and  
22 millions of dollars worth of work, looked at thousands and  
23 thousands and thousands of documents, that we may come in and do  
24 a different lawsuit that pleads around a motion to withdraw  
25 reference is no basis for a stay.

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1           That – that – the narrative about, you know, the  
2           hearsay, the narrative about the aspersions, the this and the  
3           that, this is really complicated, this is really hard, well, we  
4           have a lawsuit in front of you, Your Honor, and it's been  
5           pending for months. And it was filed by the committee that had  
6           authority to file it and it was filed by the law firm for the  
7           committee that had authority to represent the client who filed  
8           it. And that's what they came up with after months and months  
9           and months of years of looking at stuff and looking at documents  
10          and deciding what to bring as far as claims of this nature  
11          against these defendants. I'm worried about two of them.

12           I'm worried about – particularly worried with respect  
13          to the stay, I'm worried about both of them for – with respect  
14          to the stay, but one of my clients, Highland Dallas Foundation,  
15          has had no involvement in this bankruptcy case. And now let's  
16          just wait around. It's got a \$24 million cloud hanging over its  
17          head and it's expected to continue to try to raise money and try  
18          to act as a charity while – while Mr. Kirschner gets familiar –  
19          refamiliarized and gets familiar with the situation where  
20          counsel and the committee have been working for, what, a year  
21          and a half, two years, to get ready, and here's what the lawsuit  
22          – here's the lawsuit they came up with.

23           So no harm has been alleged. In fact, harm will be –  
24          all you heard about the potential harm to the estate is that  
25          notwithstanding millions and tens of millions of dollars of fees

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1 paid to professionals to determine litigation claims and we have  
2 barely, what, two months left to bring them? That's 22 months  
3 worth of looking into things, millions and millions of fees.  
4 The estate might be irretrievably harmed if a motion to withdraw  
5 reference moves forward, when the committee and counsel were  
6 responsible and filed this complaint, and they were responsible  
7 to file the complaint under the transaction and occurrences,  
8 standards such that whatever they haven't pled, whatever they  
9 haven't pled by the time to plead is gone. And the idea that we  
10 need another 22 months for Mr. Kirschner to get up to speed or  
11 some other to come up with additional litigation and additional  
12 amendments to postpone a withdrawal of reference means that you  
13 can never get a hearing on a withdrawal of reference.

14 We think the pleadings are there. They have been –  
15 they have been investigated, we assume. They're subject to  
16 motions to dismiss, which are legal questions. They're subject  
17 to motions to withdraw reference, which are legal questions.  
18 And we're ready for a decision on what court's going to handle  
19 this. And by the time that's done, Mr. Kirschner will have  
20 whatever rights he has, as if he has any. The plan will either  
21 be confirmed and effective or it won't be, but that's not our  
22 problem. Thank you.

23 THE COURT: Any other closing arguments?

24 Going once, going twice.

25 MR. ASSINK: Your Honor, I apologize. Just for the

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1 record, this is Bryan Assink for Mr. Dondero. And Mr. Dondero  
2 joins in the objections made by defendants in this proceeding  
3 and adopts the arguments made by Mr. Phillips. That is all,  
4 Your Honor. Thank you.

5 MR. DRAPER: Your Honor, can the Court hear me?

6 THE COURT: Yes.

7 MR. DRAPER: This is Douglas – okay. What I'd like to  
8 make, a short comment. The argument that there are unserved  
9 parties is a red herring and it's a red herring for the  
10 following reason. The Court has to go through each defendant to  
11 determine if they have a right to – a right to withdraw a  
12 reference. The facts with respect to Mr. Phillips' clients are  
13 different than the facts with respect to my clients. So the two  
14 unserved parties may have a right to do it, they may not, but it  
15 doesn't affect your ruling with respect to Mr. Phillips' clients  
16 or mine because we have either waived or didn't waive our right  
17 to a jury trial. And so this argument that there's two other  
18 parties out there, again, is a red herring. They have their own  
19 right and it will not affect Mr. Phillips' right or mine. So I  
20 think that needs to be taken into account.

21 And, again, all we're talking about is location. The  
22 – if they want to amend their suit at a later point, that's  
23 fine, but we are just talking about who's going to hear the  
24 case. And, quite frankly, Mr. Phillips is right, I don't think  
25 the Court can in a very short period of time unpack these

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1 withdrawal issues. And so you may be looking at a  
2 recommendation that you make that takes 30 or 60 days. We don't  
3 know what the District Court's going to do with it. And, quite  
4 frankly, you know we may be 90 or 120 days down the road before  
5 the location is even determined.

6 That's all I have to say, Your Honor.

7 THE COURT: All right. Anyone else?

8 THE RULING OF THE COURT

9 THE COURT: All right. I'll just be honest, I've  
10 tried hard to understand where everyone is coming from here, but  
11 this has been yet another hearing where I just frankly don't  
12 understand why the big fight, why all the papers, and why all  
13 the Court time used.

14 I mean I think I hear everyone agreeing that the  
15 plaintiff is essentially going to get its/his 90-day stay here.  
16 I mean if I were to go forward on the motions, plural, motions  
17 to withdraw the reference, let's be real, it's going to take:  
18 This Court two or three or four weeks to get a report and  
19 recommendation to the District Court, given the complexity here  
20 of the parties and, you know, we try to do a very clear roadmap  
21 for the District Court, what's this lawsuit about, who are the  
22 parties; and then it's going to take a few weeks for the  
23 District Court to rule on that. So I mean optimistically, the  
24 most optimistic thing I can imagine is 60 days from now you have  
25 an order from the District Court saying where the lawsuit's

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1 going to go forward.

2 I mean so we're fighting, to me, over a big nothing  
3 burger. I think the stay is, in effect, going to happen. So  
4 all we're talking about here is pushing a plaintiff to go  
5 forward, who at this point is working for free because the plan  
6 hadn't gone effective and he hadn't been appointed. I mean it  
7 seems like from my perspective the defendants – again I'm trying  
8 to understand the practicalities here, but I'm going to be  
9 honest, it almost feels like defendants tweaking with the future  
10 litigation trustee, 'We're going to make you go forward and work  
11 for free when at the end of the day you're probably going to get  
12 a stay anyway,' because there's no way a district judge is going  
13 to rule on this in much sooner than 90 days. It's like you're  
14 just forcing him to work for free and move fast on the motion to  
15 withdraw the reference.

16 And it is a red herring? I don't know, maybe. I  
17 think likely this is ultimately going to be tried in the  
18 District Court since certain parties haven't filed proofs of  
19 claim. But if the District Court does what it always does, in  
20 my experience, I've never had, I can't remember ever having a  
21 district court say, 'I'm withdrawing the whole darn thing.'  
22 They almost always use the – they almost always use the  
23 bankruptcy judges as their magistrates in a case when they  
24 withdraw the reference.

25 Bankruptcy judge, handle all the pretrial stuff, the

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1 discovery disputes, the motions to dismiss, motions for summary  
2 judgment. If you were on a motion to dismiss or a motion for  
3 summary judgment in a way that would finally dispose of any  
4 claims, well, you have to do that in a report and recommendation  
5 to me. So I feel like we all know that's likely where this is  
6 heading, so I don't know why we had to have an hour fight.

7 I don't know why it's any big shakes to just stay the  
8 whole darn thing for 90 days, especially when we have the whole  
9 reason the plaintiff, liquidating trustee is not in place yet,  
10 because of a stay, that some of these defendants or their  
11 affiliates have wanted. It just seems silly to me.

12 And I do want to address one other thing. There has  
13 been an argument that Sidley and Austin and the committee have  
14 had months to get up to speed on the issues in the lawsuit, they  
15 had months to bring it. It's been pending months. But I'll say  
16 something for the benefit of those who have not been around for  
17 this whole case, in July of last year, July 2020, which by that  
18 point was about 10 months into the case, it was front and center  
19 to this Court the difficulty the committee was having getting  
20 discovery. They had served four requests for production, going  
21 back to before this case was even pending before me. When the  
22 case was in Delaware, they were already filing, serving requests  
23 for production of documents, wanting to get a protocol in place  
24 for ESI, and then finally it all kind of came to a head in July.

25 And I remember saying, 'I'm sure there's a transcript



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1 out there you can access.' Gee, I may not have pressed the  
2 issue so much on this lawsuit being filed involving CLO Holdco.  
3 I may not have pressed the committee's feet to the fire so much  
4 on getting that filed if I had been fully aware at all of these  
5 efforts going on outside of the Court to get documents, to get  
6 documents, four requests for production, and then finally the  
7 protocol order, if you will, that the committee filed, asking  
8 this Court to put in place some protocol to get ESI from like  
9 nine different custodians of debtor records. So my point is  
10 those who have not lived with this case for the whole time, they  
11 don't know that I kind of live to regret pressing the committee  
12 to get this lawsuit on file. You know I was worried because of  
13 Holdco. I had like ordered money to be put in the registry of  
14 the Court before I had, you know, litigation pending. So that's  
15 why I put pressure. But then I learned and had a multi-hour  
16 hearing on what the committee had gone through trying to get  
17 documentation. So that's very much in the back of my mind here  
18 in my ruling.

19 And my ruling is going to be that I grant the 90-day  
20 continuance. Again, I hope that in 90 days, we — I don't know  
21 if we'll know something from the Fifth Circuit on the plan or  
22 not, but at least we'll be closer to that point. And, again,  
23 we're looming, you know October 16th, 2021 as a deadline for  
24 bringing claims, and I think that's relevant here. There's a  
25 lot to be focused on that may or may not impact the way this

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1 lawsuit ultimately is mapped out. I think the fact that we have  
2 two unserved defendants, I think it does matter.

3 I think a district court may be a little hesitant,  
4 really want to see the complete picture on each defendants'  
5 position before it rules. So the 90-day stay is granted.

6 All right. So please upload the order, Ms.  
7 Montgomery.

8 Thank you, all, for your arguments.

9 Before we wrap it up, Mr. Clubok, if you're still with  
10 us, I think you were hoping to raise something that might  
11 pertain to tomorrow's hearing on the UBS debtor compromise. If  
12 you're still there, you may speak to whatever it was you wanted  
13 to present.

14 MR. CLUBOK: Good morning, Your Honor. Still – still  
15 the morning. Hopefully you can hear me.

16 THE COURT: I can.

17 MR. CLUBOK: Your Honor, I'm really just previewing an  
18 issue. In light of the comment that you made earlier today  
19 about having this motion, discovery, and then folks not  
20 previewing it, I just wanted to alert you to the fact that in  
21 our adversary proceeding we have sought discovery against five  
22 third parties, Scott Ellington, Isaac Ellington, three other  
23 folks, all of whom are represented by Ms. Smith, who is here,  
24 you can see. And we first sought –

25 MS. SMITH: This is Frances Smith. Your Honor,

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1 Frances Smith on behalf of Mr. Ellington, J.P. Sevilla, Mr.  
2 Isaac Leventon, Matt VRO, and Mary Catherine Lucas (phonetics).

3 I just received an email earlier this morning from Mr.  
4 Clubok that he was going to do this preview for you. To the  
5 extent he gets into the substance of any motions that are not  
6 filed, that's inappropriate. And so –

7 THE COURT: Okay.

8 MS. SMITH: – if he wants to take Your Honor offer of  
9 a preview to say what he is going to file, I'm fine with that.  
10 But if he's going to start going into the substance, that is not  
11 appropriate.

12 THE COURT: Okay. We'll let Mr. Clubok get a little  
13 further into what he was going to say, and then we'll decide do  
14 we need to cut it off.

15 Mr. Clubok, go ahead.

16 MR. CLUBOK: Thank you, Your Honor. I was about to  
17 say that there were five – there's the five individuals that Ms.  
18 Smith represents, we sought discovery from in April 2nd, and,  
19 namely, depositions. After a long period of time culminating in  
20 a meet-and-confer last week, Ms. Smith filed a motion to quash  
21 on behalf of these five individuals on Monday and set a hearing  
22 date for July 29th.

23 All I'm – all I'm previewing, Your Honor, is to alert  
24 you that in response to that motion to quash, a hearing date set  
25 for July 29th, so effectively will end up being, you know,

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1 months and months of delay to these individuals who are needed  
2 to move this conjunctive-relief proceeding forward, we are  
3 filing our response today to Ms. Smith's motion and a  
4 countermotion to compel. And I'm merely flagging this issue for  
5 Your Honor because we are going to ask either Your Honor or Ms.  
6 Ellison, we're going to style our motion as an expedited  
7 request, we would just simply love to have a hearing as early as  
8 reasonably practicable on these issues. And I have no intention  
9 of getting into the merits now, but happy to do so. I think it  
10 will all be familiar to you from their discussions in the  
11 Dondero deposition dispute, but we just – or simply I'm just  
12 flagging for you, because you raised it this morning, you know,  
13 why didn't people tell me, so we just are going to ask the  
14 hearing, the soonest-possible hearing, and I don't think it has  
15 to be a very long hearing, on whether or not we get third-party  
16 discovery, depositions of Mr. Ellington, Mr. Leventon, and the  
17 other three individuals that Ms. Smith represents; subject to  
18 one of them is on maternity leave, and we're going to be  
19 pursuing discovery of that while she's in that state, but –

20 THE COURT: All right.

21 MR. CLUBOK: – but other than that we just ask that a  
22 hearing to be scheduled. And I'm just alerting you that we're  
23 going to be making that request.

24 THE COURT: Okay. Well, I have been forewarned. I  
25 have been forewarned. And I'll wait to see the motion for

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1 expedited hearing and decide if I think it's appropriate to give  
2 an expedited hearing, okay? I'll look at the pleadings and  
3 likely just rule on the pleadings on the timing, okay?

4 Thank you.

5 MR. CLUBOK: Your Honor, -

6 MS. SMITH: Your Honor, since we're previewing, we  
7 will be filing a response to that as well.

8 THE COURT: All right.

9 MS. SMITH: Thank you, Your Honor.

10 COURT SECURITY OFFICER: All rise.

11 (The hearing was adjourned at 11:45 o'clock a.m.)

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State of California                   )  
County of San Joaquin               )     SS.

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

I am a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Certificate Nos. CER-124 and CET-124. Palmer Reporting Services is approved by the Administrative Office of the United States Courts to officially prepare transcripts for the U.S. District and Bankruptcy Courts.

Susan Palmer

Susan Palmer  
Palmer Reporting Services

Dated May 22, 2021

## EXHIBIT 33

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

In re:	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Debtor,	§	
-----	§	
THE CHARITABLE DAF FUND, L.P.	§	
and CLO HOLDCO, LTD.,	§	
	§	
Plaintiffs/Appellants,	§	
	§	
v.	§	CIVIL ACTION NO. 3:21-CV-3129-B
	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Defendant/Appellee.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Appellants The Charitable DAF Fund, L.P. (Charitable DAF) and CLO Holdco, Ltd. (CLO Holdco)'s appeals from the bankruptcy court's Motion to Dismiss Order and Motion to Stay Order. For the reasons that follow, the Motion to Dismiss Order is **REVERSED** and **REMANDED**. The Motion to Stay Order is **AFFIRMED**.



I.

BACKGROUND<sup>1</sup>

These are consolidated appeals from an adversary proceeding in a bankruptcy case. The Debtor, Highland Capital Management, L.P. (HCM), filed for Chapter 11 bankruptcy on October 16, 2019, in the United States Bankruptcy Court for the District of Delaware and that court transferred venue to the United States Bankruptcy Court for the North District of Texas. *In re Highland Cap. Mgmt. L.P.*, 2022 WL 780991, at \*1 (Bankr. N.D. Tex. Mar. 11, 2022).

In 2017, Charitable DAF—through the holding entity CLO Holdco—purchased 49.02% of the available shares of Highland CLO Funding, Ltd. (HCLOF) based upon investment advice from HCM.<sup>2</sup> Doc. 9, Appellant’s Br., 5. Another entity, HarbourVest, acquired 49.98% of the HCLOF shares and HCM and its employees acquired the remaining 1%. *Id.*; Doc. 21, Appellee’s Br., 7. A company agreement (the HCLOF Member Agreement) governing the rights and obligations of HCLOF shareholders purportedly prohibited a member from “sell[ing] shares to another member without first providing all other members the right to purchase a pro rata portion thereof at the same price” (the Right of First Refusal). Doc. 9, Appellant’s Br., 6. The value of the HCLOF shares fluctuated throughout the bankruptcy proceedings; the actual value is one of the issues giving rise to some of Charitable DAF’s causes of action. *Id.* at 6–7; R. at 551–65.

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<sup>1</sup> Because these are two consolidated appeals with separate appellate records, the Court indicates when it switches between the separate appellate records by footnotes. The Appellant’s Brief and record cites in this Background section are in Doc. 6 in case No. 3:22-CV-0695-B. Appellee’s Brief, which was filed after consolidation, is in case No. 21-CV-3129-B.

<sup>2</sup> Except where otherwise stated, the Court refers to Charitable DAF and CLO Holdco collectively as Charitable DAF because Charitable DAF controls and owns CLO Holdco and both entities have the same director. Doc. 21, Appellee’s Br., 7 & n.6. Appellant Charitable DAF does not dispute this relationship and imputes the actions of CLO Holdco to itself throughout Appellant’s brief. *See* Doc. 9, Appellant’s Br., 13–14 (imputing the Objection to both Appellants).

During the bankruptcy, “HarbourVest filed proof of claims against [HCM] totaling over \$300 million, notionally.” Doc. 9, Appellant’s Br., 6. As part of the settlement for these claims, “HarbourVest agreed to sell its interest in HCLOF to [HCM].” *Id.* at 8. HCM would then have majority ownership of HCLOF. *See id.* at 5; Doc. 21, Appellee’s Br., 7. “CLO Holdco filed an objection to the settlement, contending that the HCLOF Member Agreement entitled [CLO] Holdco to a Right of first Refusal” (the Objection). Doc. 9, Appellant’s Br., 8. At the beginning of the settlement hearing (the Rule 9019 Settlement Hearing), CLO Holdco withdrew its Objection. Doc. 21, Appellee’s Br., 10–11; R. at 6269–70. After overruling the remaining objections from the other parties, the bankruptcy court approved the HarbourVest Settlement. Doc. 9, Appellant’s Br., 9.

This Adversary Proceeding stems from the complaint filed by Appellants on April 12, 2021, in this Court in *Charitable DAF Fund, L.P. et al. v. Highland Capital Management, L.P., et al.*, Case No. 3:21-CV-0842-B. *Id.*; Complaint, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-CV-0842-B (N.D. Tex. Apr. 12, 2021), Doc. 1. On September 20, 2021, this Court referred that case to the bankruptcy court for “docket[ing] as an Adversary Proceeding associated with the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P.” Order of Reference, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-CV-0842-B (N.D. Tex. Sept. 20, 2021), Doc. 64. During the Adversary Proceeding, Appellants moved for a stay of the case (the Motion to Stay) and Appellees moved to dismiss the case (the Motion to Dismiss). R. at 1634–67, 3248–52. On November 23, 2021, the bankruptcy court held a hearing on the Motion to Stay and Motion to Dismiss. *Id.* at 5951. The bankruptcy court denied the Motion to Stay at the hearing and later entered an order granting the Motion to Dismiss, dismissing all causes of action with prejudice. *Id.* at 5977; *In re Highland*, 2022 WL 780991, at \*12. Appellants promptly appealed both orders; this

Court consolidated the appeals. *In re Highland Cap. Mgmt.*, 2022 WL 2193000, at \*1, \*4 (N.D. Tex. June 17, 2022). While the appeals were pending, the Fifth Circuit affirmed the HCM reorganization plan (the Plan), but vacated the exculpatory provision “as to all parties *except* [HCM], the Committee and its members, and the Independent Directors for conduct within the scope of their duties.” *Highland Cap. Mgmt., L.P. v. NexPoint Advisors, L.P.*, 2022 WL 3571094, at \*14 (5th Cir. Aug. 19, 2022).

The appeals are fully briefed and ripe for review. The Court considers them below.

## II.

### LEGAL STANDARDS

Final judgments, orders, and decrees of a bankruptcy court may be appealed to a federal district court. 28 U.S.C. § 158(a). Because the district court functions as an appellate court in this scenario, it applies the same standards of review that federal appellate courts use when reviewing district court decisions. *In re Webb*, 954 F.2d 1102, 1103–04 (5th Cir. 1992) (citations omitted).

#### A. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) authorizes a court to dismiss a plaintiff’s complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, “[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). But the court will “not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts.” *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

To survive a motion to dismiss, plaintiffs must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). When well-pleaded facts fail to meet this standard, “the complaint has alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* at 679 (quotation marks and alterations omitted).

B. *Motion to Stay*

Incidental to a court’s inherent power to control its docket is the power to stay proceedings before it. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A court considers four factors when determining whether to stay a case pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). “The first two factors of the traditional standard are the most critical.” *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Nken*, 556 U.S. at 434).

### III.

#### ANALYSIS

The Court begins with the appeal of the Motion to Dismiss Order because it can only review the appeal of the Motion to Stay Order if it reverses the bankruptcy court's decision to dismiss the causes of action in the adversary proceeding. *In re Highland*, 2022 WL 2193000, at \*2. Finding reversal of the Motion to Dismiss Order warranted, the Court then reviews the appeal of the Motion to Stay Order.

##### A. *Appeal of the Motion to Dismiss Order*<sup>3</sup>

Charitable DAF raises three issues in its appeal of the Motion to Dismiss Order: (1) whether the bankruptcy court “commit[ted] reversible error by sua sponte dismissing this action on the basis of collateral estoppel without giving notice and an opportunity to respond”; (2) whether collateral estoppel barred Charitable DAF's claims when the claims were adjudicated in a Rule 9019 Settlement Hearing; and (3) whether the bankruptcy court's application of judicial estoppel erroneously relied on a transcription error, an ostensibly inconsistent position of Charitable DAF, or a failure to conclude that “subsequently discovered evidence . . . render[ed] the ostensible inconsistency ‘inadvertent.’” Doc. 9, Appellant's Br., 2.

An appellate court reviews a dismissal under Rule 12(b)(6) de novo. *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 868 (5th Cir. 2000). “[T]he application of collateral estoppel is” also reviewed de novo. *Id.* (quoting *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). However, “a [bankruptcy] court's decision to invoke the equitable doctrine of judicial estoppel [is reviewed] for abuse of discretion.” *Cox v. Richards*, 761 F. App'x 244, 246 (5th Cir. 2019) (citing

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<sup>3</sup> For this appeal, the record and document citations are in case No. 3:22-CV-0695-B. However, Appellee's Brief is in case No. 21-CV-3129-B.

*United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 271 (5th Cir. 2015)). Therefore, this Court reviews the bankruptcy court's sua sponte invocation of collateral estoppel de novo, the application of collateral estoppel de novo, and the invocation of judicial estoppel for abuse of discretion. The Court addresses each in turn below.

1. Sua Sponte Dismissal

The bankruptcy court dismissed Charitable DAF's claims with prejudice based on collateral estoppel—even though neither party raised the issue “per se”—finding their res judicata arguments relevant to the issue. *In re Highland*, 2022 WL 780991, at \*7. The Court first considers whether the sua sponte application was proper.

Charitable DAF challenges the bankruptcy court's sua sponte invocation of collateral estoppel to dismiss its claims. Doc. 9, Appellant's Br., 11–12. Specifically, Charitable DAF argues that the bankruptcy court could “only do so if the ‘procedure employed is fair’—that is, if prior notice is given with adequate time for the plaintiff to prepare a response.” *Id.* at 12 (quoting *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177–78 (5th Cir. 2006)). The failure to provide “notice and an opportunity to dispute the claimed bases for dismissal is reversible error,” according to Charitable DAF. *Id.*

The Court disagrees. The Fifth Circuit has recognized two instances when a court may dismiss a case sua sponte on the basis of collateral estoppel: when (1) “both actions were brought in courts of the same district” or (2) “all of the relevant facts are contained in the record and . . . uncontroverted.” *OneBeacon Am. Ins. Co. v. Barnett*, 761 F. App'x 396, 399 (5th Cir. 2019) (first quoting *Trammell Crow Residential Co. v. Am. Prot. Ins. Co.*, 574 F. App'x 513, 522 (5th Cir. 2014); and then quoting *Mowbray v. Cameron Cnty.*, 274 F.3d 269, 281 (5th Cir. 2001)). This case easily

fits into the first category because all of the proceedings at issue took place in the bankruptcy court before the same judge. See *In re Highland*, 2022 WL 780991, at \*7 (relying on the former category to dismiss the case). Thus, the bankruptcy court did not err by raising the collateral estoppel issue sua sponte.

This case is unlike the *Carroll* case cited by Charitable DAF, which did not involve collateral estoppel. 470 F.3d 1171. In *Carroll*, the Fifth Circuit held that a court may dismiss a case sua sponte under Federal Rule of Civil Procedure 12(b)(6) if the “procedure employed is fair[,]” which requires “both notice of the court’s intention and an opportunity to respond.” *Id.* at 1177 (quoting *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998)). The district court erred by not providing “notice or opportunity to be heard” and “did not even . . . mention [some of the dismissed] claims in its order of dismissal.” *Id.*

This case is more akin to *McIntyre v. Ben E. Keith Co.* where the Fifth Circuit upheld the district court’s sua sponte raising of the issue of res judicata to dismiss the case under Rule 12(b)(6). 754 F. App’x 262, 265 (5th Cir. 2018). In *McIntyre*, the plaintiff’s “Civil Rights Act and FLSA actions were brought before the same federal district court.” *Id.* Because the latter action closely resembled the former action, the Fifth Circuit found no reversible error with the district court’s raising the issue of res judicata sua sponte. *Id.*

First, dismissal for failure to state a claim like in *Carroll* and dismissal for collateral estoppel as in the instant case are conceptually and procedurally different. In the former, the plaintiff is in the process of attempting to “allege[] [their] best case,” *Bazrowx*, 136 F.3d at 1054, while collateral estoppel occurs after a plaintiff “alleged [their] best case” and fully litigated the issue. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Put more succinctly, collateral estoppel eliminates “unnecessary

judicial waste” from repeated attempts at alleging the best case. *Arizona v. California*, 530 U.S. 392, 412 (2000) (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)). Second, the parties addressed res judicata during oral argument and in their pleadings before the bankruptcy court. While res judicata is not collateral estoppel, it is closely related. *Hous. Prof'l Towing Ass'n v. City of Houston*, 812 F.3d 443, 447 (5th Cir. 2016) (“[R]es judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion.”). Thus, the bankruptcy court employed a fair procedure by allowing the parties to litigate the issues, including res judicata, before dismissing the case sua sponte. See generally *Carver v. Atwood*, 18 F.4th 494, 497 (5th Cir. 2021) (“District courts may, for appropriate reasons, dismiss cases *sua sponte*.”).

The Court next considers whether the bankruptcy court’s substantive application of collateral estoppel was proper.

## 2. Collateral Estoppel

“Collateral estoppel prevents litigation of an issue when: ‘(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision.’”<sup>4</sup> *Bradberry v. Jefferson Cnty.*, 732 F.3d 540, 548 (5th Cir. 2013) (quoting *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005)). “Relitigation of an issue is not precluded unless the facts and the legal standard used to assess them are the same in both proceedings.” *In re Southmark Corp.*, 163 F.3d at 932.

Charitable DAF attacks each element of collateral estoppel, so the Court addresses each

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<sup>4</sup> Appellant lists a fourth element occasionally referenced by the Fifth Circuit—“there is no special circumstance that would make it unfair to apply the doctrine”—but the Court finds no reason to address this possible fourth element in this case. See *In re Southmark Corp.*, 163 F.3d 925, 932 n.9 (5th Cir. 1999) (declining to apply the fourth element because appellant “failed to support it factually”).



element individually.

*i. Identical issue*

The bankruptcy court found “(a) consideration of the value that the estate was both receiving and paying, as well as (b) the potential existence of a ‘Right of First Refusal’ . . . [were] the gravamen of [Charitable DAF’s] Complaint.” *In re Highland*, 2022 WL 780991, at \*9 (emphasis omitted). During the settlement hearing, the bankruptcy court had to determine whether the HarbourVest Settlement “was ‘fair and equitable’ and in the ‘best interests of creditors,’ and whether it was the ‘product of arms-length bargaining, and not of fraud or collusion[.]’” *Id.* at \*8. This determination entailed “arguments and evidence regarding the methodology for the valuation of the HCLOF interest and the existence or non-existence of a ‘Right of First Refusal.’” *Id.*

Charitable DAF argues that the issues are not identical because the Objection “only addressed whether HarbourVest . . . had performed all conditions precedent to being able to transfer the interest to Highland *as another co-investor*” and did not present an identical claim “for breach of the HCLOF [Member] Agreement” and associated damages. Doc. 9, Appellant’s Br., 13–14. Further, “even if this one contract issue was fully . . . litigated,” only the second cause of action in Charitable DAF’s complaint arguably parallels that issue, according to Charitable DAF—the others are distinct. *Id.* at 14–15. Charitable DAF contends that these non-contract causes of action rely on evidence that was not known at the Rule 9019 Settlement Hearing, “stem from events that either occurred post-hearing, or were not discovered until after the hearing.” *Id.* at 15.

The Court finds the issues are identical. CLO Holdco’s Objection specifically argued:

Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally

inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless.

R. at 4730. The bankruptcy court also heard argument and testimony from Seery, HCM's chief executive and chief restructuring officer, and Pugatch, a managing director of HarbourVest, about the valuation of HCLOF's assets at the settlement hearing. *Id.* at 6273, 6292, 6303–05 (“The twenty-two and a half [million] is the current—actually, the November value of HCLOF—the HarbourVest interests in HCLOF.”), 6358, 6374 (“The current value is right around \$22-1/2 million.”).

In the Original Complaint, Charitable DAF brought five causes of action: breach of fiduciary duties, breach of the HCLOF Member Agreement, negligence, RICO, and tortious interference. *Id.* at 551–65. The breach of fiduciary duties and negligence causes of action center around the alleged concealment of the rising value of HCLOF's assets and failing to offer the purchase of the assets to CLO Holdco or Charitable DAF before offering to HCM. *Id.* at 553–55, 559–60. The breach of the HCLOF Member Agreement cause of action encompasses the Right of First Refusal in the agreement. *Id.* at 558–59. The RICO cause of action alleges that HCM used mail and wire fraud “to obtain or arrive at valuations of the HCLOF interests,” and “conceal[ ] the true value of the HCLOF interests.” *Id.* at 560–64. Lastly, the tortious interference cause of action stems from HCM's alleged interference with CLO Holdco's Right of First Refusal in the Member Agreement and “misrepresenting the fair market value” of HCLOF's assets. *Id.* at 564–65. In sum, all of these causes of action involve either the valuation of HCLOF or the Right of First Refusal, so the issues are the same as those before the bankruptcy court at the Rule 2019 Settlement Hearing.

ii. *Actually Litigated*

The bankruptcy court found the same arguments were also actually litigated, reasoning:

The Bankruptcy Court would never have approved the HarbourVest Settlement if it thought the value being exchanged was not fair, or if it thought the HCLOF Interests could not be transferred and that someone might later sue the Debtor, claiming the Transfer was improper. All parties had the chance to argue and present evidence about this. The Bankruptcy Court made a ruling based on the evidence and argument.

*In re Highland*, 2022 WL 780991, at \*9.

Charitable DAF argues that because the Objection was withdrawn and no one objected to the withdrawal, the issue asserted therein was not litigated. Doc. 9, Appellant's Br., 16. Additionally, it claims the Rule 9019 Settlement Hearing is not a mini-trial and, therefore, cannot serve as an opportunity for a party to litigate their claims. *Id.* at 17–18 (citing *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Refin., Inc.)*, 801 F.3d 530, 541 (5th Cir. 2015)).

An issue is not actually litigated and, thus, precluded unless the legal standard in the prior action mirrors the legal standard of the latter action. *Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1422 (5th Cir. 1995) (citations omitted). The bankruptcy court approved the HarbourVest Settlement after applying the *Jackson Brewing* test, which considers:

(1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.

R. at 5568; *see also In re Highland*, 2022 WL 780991, at \*8 (quoting *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015)). Stated more succinctly, when faced with a settlement, the bankruptcy court ensures the “compromise is truly ‘fair and equitable’ and ‘in the best interest of the estate.’” *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th

Cir. 1980) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson* (TMT Trailer), 390 U.S. 414, 424 (1968)).

However, in the context of litigating actual claims—such as those asserted by Charitable DAF—a court applies a preponderance of the evidence standard, not the probability of success standard from *Jackson Brewing. Copeland*, 47 F.3d at 1423; *In re Zale Corp.*, 62 F.3d 746, 766 n.60 (5th Cir. 1995) (“We also note for future reference that the legal standard in a settlement hearing differs from that applicable in an adversary proceeding or state court trial . . . . Consequently, we doubt that the findings of the bankruptcy court in a settlement hearing would have preclusive effect in adversary proceedings or state court trials.”). *See generally Weaver v. Aquila Energy Mktg.*, 196 B.R. 945, 957 (S.D. Tex. 1996) (“[S]ettlement hearings and preference actions involve the application of different legal standards.”). “Examining whether a particular settlement is fair or equitable and in the best interest of the estate and creditors is a different inquiry, driven by different policies, than litigation of the actual claim.” *Copeland*, 47 F.3d at 1423. While the issues of the Right of First Refusal and the valuation of HCLOF were raised in the Rule 9019 Settlement Hearing, the parties did not fully litigate the issues as one would at trial, and the bankruptcy court did not resolve the issues according to a preponderance of the evidence standard. Because the bankruptcy court applied a legal standard in the Rule 9019 Settlement Hearing that is inapplicable to the adjudication of Charitable DAF’s causes of action, the issues were not actually litigated in the Rule 9019 Settlement Hearing and collateral estoppel does not apply.<sup>5</sup> The Court **REVERSES** the bankruptcy court on this issue.

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<sup>5</sup> Having found the second element of collateral estoppel unmet, the Court need not address the third element—necessity of the previous determination to the prior decision.

3. Judicial Estoppel

The bankruptcy court found the elements of judicial estoppel met and barred the second and fifth causes of action, which rely on the Right of First Refusal. *In re Highland*, 2022 WL 780991, at \*12. The Court now addresses whether judicial estoppel applies to Charitable DAF's second and fifth causes of action.

Judicial estoppel is an equitable common law doctrine aimed at preventing a party from asserting an inconsistent legal position from a previous proceeding. *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999). "The purpose of the doctrine is 'to protect the integrity of the judicial process', by 'prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest.'" *Id.* (alteration in original) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)). A court examines three criteria when determining the applicability of judicial estoppel: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc).

Charitable DAF raises arguments for each of the judicial estoppel elements, so the Court addresses each element below.

i. *Inconsistent legal position*

Charitable DAF argues that the bankruptcy court's determination relies on a transcription error that amounted to an admission of HCM's compliance with the Right of First Refusal. Doc. 9, Appellant's Br., 22–23. The corrected transcript makes clear that no admission was made on behalf of CLO Holdco, according to Charitable DAF. *Id.* at 23–24.

The relevant portion of the original transcript reads:

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client, **but** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.

R. at 6280. The corrected transcript reads:

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client **that** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.

Doc. 9-1, Appellant's Br. Ex. A, 4.

Accepting this verison of the record, CLO Holdco refused to "enter into a short stipulation on the record reflecting that the Debtor's acquisition of HarbourVest's interests in HCLOF is compliant with all of the applicable agreements between the parties." *Id.*; R. at 6280. However, moments before this, CLO Holdco withdrew its Objection premised on the Right of First Refusal stating:

CLO Holdco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the HCLOF corporate documents. Based on our analysis of Guernsey law and some of the arguments of counsel in those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as Trustee for CLO Holdco, to withdraw the CLO Holdco objection based on the interpretation of the member agreement.

R. at 6269–70. The bankruptcy court's decision rests primarily on this earlier withdrawal of the Objection and only later buttresses its argument with the then-unknown transcription error. *In re Highland*, 2022 WL 780991, at \*11 (following discussion of the withdrawal of the Objection with "[i]f that weren't enough" before mentioning the then-unknown transcription error). Thus, if the earlier withdrawal—without the transcription error—satisfies the first element of judicial estoppel then the bankruptcy court did not commit any error even if it referenced an incorrect transcription of the latter exchange.

The Court finds the bankruptcy court did not err in finding the first element of judicial estoppel. CLO Holdco made clear in the withdrawal of its objection that it no longer disputed the other parties' interpretation of the Right of First Refusal, which now forms the basis of Charitable DAF's second and fifth causes of action. See R. at 6269–70. Thus, the withdrawal of the objection put CLO Holdco on the opposite side of the legal argument that Charitable DAF now makes in its second and fifth causes of action. The first element of judicial estoppel is established because Charitable DAF has taken inconsistent positions in separate proceedings.

ii. *The bankruptcy court accepted the prior position*

The bankruptcy court solely relied on the withdrawal of the Objection to find the second element of judicial estoppel established. *In re Highland*, 2022 WL 780991, at \*12. In the words of the bankruptcy court, it “perceived [this objection] as one of the major arguments that was relevant to the HarbourVest Settlement.” *Id.* “The [b]ankruptcy [c]ourt relied upon that withdrawal of CLO Holdco's objection in making the determination to approve of the HarbourVest Settlement and, specifically, that Highland would not be running afoul of any obligation in entering into the HarbourVest Settlement.” *Id.*

Charitable DAF argues that there is no acceptance by the bankruptcy court of a prior position because without the transcription error, there is no admission and no inconsistent position. Doc. 9, Appellant's Br., 25–26. Further, it contends that the withdrawal of the Objection is not the equivalent of stating the Right of First Refusal causes of action are meritless. *Id.* at 26–27.

The bankruptcy court did not err in finding the second element of judicial estoppel met because it necessarily relied on the change in CLO Holdco's assessment of its Objection. The Right of First Refusal created a major obstacle to approval of the HarbourVest Settlement. When CLO

Holdco withdrew its Objection based on the Right of First Refusal, the Court had to accept CLO Holdco's position that the Right of First Refusal no longer posed an obstacle to the HarbourVest Settlement. Thus, the Court finds no error by the bankruptcy court for the second element of judicial estoppel.

iii. *Inadvertence of Charitable DAF*

The bankruptcy court did not examine the inadvertence of Charitable DAF in asserting inconsistent legal positions. See *In re Highland*, 2022 WL 780991, at \*12.

Charitable DAF argues that it did not know the facts for several of its claims until after the settlement hearings, so it could not have asserted these claims at the hearing. Doc. 9, Appellant's Br., 27. Charitable DAF relies on the allegations surrounding the valuations of the HCLOF assets and the alleged acts violating the RICO statutes. *Id.* at 27–29. Additionally, the bankruptcy court did not address the inadvertence element for judicial estoppel and a failure to apply the correct legal standard is reversible error, Charitable DAF contends. Doc. 9, Appellant's Br., 27; Doc. 27, Appellant's Reply, 3–4.

The Court agrees with Appellant's last argument. A court abuses its discretion by applying the wrong legal standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Def. Distrib. v. Bruck*, 30 F.4th 414, 427 (5th Cir. 2022). And the misapplication of a legal standard is reviewed de novo. *In re Woerner*, 783 F.3d 266, 270–71 (5th Cir. 2015). By not addressing the third element of judicial estoppel, the bankruptcy court applied the wrong legal standard. The Fifth Circuit implicitly recognized this third element—inadvertence—in *In re Coastal Plains, Inc.*, 179 F.3d at 206, 210, which the bankruptcy court cited for its legal standard. *In re Highland*, 2022 WL 780991, at \*11. The Fifth Circuit has since clarified that “[t]his circuit . . . recognizes *three* particular requirements”



for judicial estoppel. *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 386 (5th Cir. 2008) (emphasis added). Because the bankruptcy court did not address the inadvertence element in its order dismissing Charitable DAF's second and fifth causes of action, the bankruptcy court abused its discretion. While the district court finds no issue in the bankruptcy court's analysis of the first two elements of judicial estoppel, the bankruptcy court did not address this third element, warranting remand for determination by the bankruptcy court whether Charitable DAF acted inadvertently to change its legal position.

3. Leave to Amend

Charitable DAF requested leave to amend its complaint in its response to the motion to dismiss, R. at 2272–73, which the bankruptcy court denied by dismissing all claims with prejudice. *In re Highland*, 2022 WL 780991, at \*12. The Court need not address this argument because, upon remand, the bankruptcy court will have the opportunity to reassess Charitable DAF's claims and determine whether amendment should be allowed under Federal Rule of Civil Procedure 15(a). See *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014) (listing factors a court considers when determining whether to allow amendment of the complaint).

*C. Appeal of the Motion to Stay Order*<sup>6</sup>

Appellant Charitable DAF raises one issue on appeal of the Motion to Stay Order: “Did the bankruptcy court err by proceeding with the case rather than staying it” when Charitable DAF was enjoined “from litigating any action against Appellee [HCM]”? Doc. 11, Appellant's Br., 2. The bankruptcy court denied Charitable DAF's Motion to Stay All Proceedings and the subsequent Amended Motion to Stay All Proceedings, reasoning:

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<sup>6</sup> For this appeal, the record and document citations are in case No. 3:21-CV-3129-B.

I just don't think that you have shown that, you know, either the exculpation clause or the injunction provisions of the plan somehow tie your hands in arguing the 12(b)(6) motion, defending against the 12(b)(6) motion today or I just think that your arguments reflect, frankly, a misunderstanding of how the injunction language and exculpation language applies here.

R. at 2087; *see also id.* at 4–5.

On appeal, Charitable DAF argues that the bankruptcy court erred in its denial of the motion for a stay because the Plan Confirmation Order's injunction prohibited Charitable DAF from participating in the case, “terminat[ing] any case or controversy and stripp[ing] the bankruptcy court of jurisdiction.” Doc. 11, Appellant's Br., 7. Accordingly, “[t]he bankruptcy court could only stay the case pending the [appeal of the Plan Confirmation Order's injunction], or dismiss the case as barred by the injunction[,]” Charitable DAF contends.” *Id.* at 9.

As noted above, the Fifth Circuit affirmed the Plan in all respects except one and specifically affirmed the injunction. *Highland*, 2022 WL 3571094, at \*13–14. The injunction in the Plan provides that “all Enjoined Parties are and shall be permanently enjoined . . . from directly or indirectly (i) commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind . . . against or affecting the Debtor or the property of the Debtor.” R. at 2401. And the term Enjoined Parties includes “(i) all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor [and] . . . (iii) any Entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case.” *Id.* at 2358.

Relatedly, the Plan exculpates HCM<sup>7</sup> “from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of [execution of the Plan].” *Id.* at 2398. However, this exculpation provision<sup>8</sup> does “not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) [other specific entities actions].” *Id.* at 2398–99.

The bankruptcy court did not abuse its discretion<sup>9</sup> in denying the motion for a stay of the case. The bankruptcy court found that the Plan’s injunction and exculpation provisions—which it *approved*—did not prevent Charitable DAF from pursuing its causes of action. *Id.* at 2087. In effect, the bankruptcy court held that Charitable DAF could continue to litigate its causes of action and the Court agrees. *See id.* Just like the bankruptcy court, this Court does not see how the injunction and exculpation provisions prohibit Charitable DAF from participating in the below action. The exculpation provision permits Charitable DAF to bring claims against HCM for “bad faith, fraud,

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<sup>7</sup> The Plan makes clear that the term Exculpated Party does not include Charitable DAF. R. at 2359 (“Exculpated Parties” means, collectively, (i) the Debtor . . . provided, however, that, for the avoidance of doubt, none of . . . the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities) . . . is included in the term ‘Exculpated Party.’”).

<sup>8</sup> Subsequently to this appeal, the Fifth Circuit vacated a portion of the exculpation provision. *Highland*, 2022 WL 3571094, at \*12. The Fifth Circuit held that “the exculpation of certain non-debtors . . . was unlawful” so the court “str[uck] all exculpated parties from the Plan except for [HCM], the Committee and its members, and the Independent Debtors.” *Id.* Charitable DAF brings its causes of action against HCM, so what remains of the exculpation provision still applies to this case. *See id.*

<sup>9</sup> The parties disagree on whether this Court reviews the denial of the stay for abuse of discretion or de novo. Doc. 11, Appellant’s Br., 6 (“Questions of law are reviewed de novo.”); Doc. 16, Appellee’s Br., 2 (“The Court reviews the bankruptcy court’s order for abuse of discretion.”). Charitable DAF does not pursue this argument in its Reply, so this argument is considered waived, *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5<sup>th</sup> Cir. 2006), as well as incorrect. *See Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App’x 389, 392 (5<sup>th</sup> Cir. 2013) (citing *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5<sup>th</sup> Cir. 1992)) (“We review a district court’s denial of a stay pending appeal for abuse of discretion.”).

gross negligence, criminal misconduct, or willful misconduct” and Charitable DAF’s causes of action—breach of fiduciary duty, breach of contract, negligence, and RICO—appear to fit within these categories of claims. *Id.* at 490–504, 2398–99. Further, Charitable DAF continued to participate by responding to HCM’s motion to dismiss and participating in the hearing regarding the motion to dismiss. See Section III(A) *supra*. Lastly and importantly, Charitable DAF did not even attempt to address the traditional stay elements. R. at 2087 (“I guess one might say the traditional four-factor test for a stay of a proceeding has really not been the subject of the argument here for a stay.”). Without argument on the factors for a stay, this Court lacks any basis to overturn the bankruptcy court.

The bankruptcy court’s Motion to Stay Order is **AFFIRMED**.

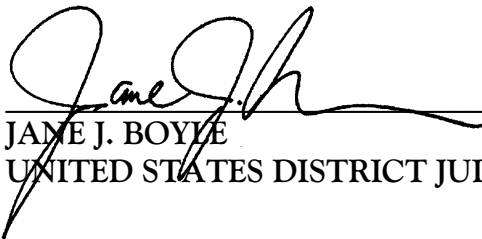
#### IV.

#### CONCLUSION

For the foregoing reasons, the Court **REVERSES** and **REMANDS** the bankruptcy court’s Motion to Dismiss Order and **AFFIRMS** the bankruptcy court’s Motion to Stay Order.

SO ORDERED.

SIGNED: September 2, 2022.

  
JAMES J. BOYLE  
UNITED STATES DISTRICT JUDGE

## EXHIBIT 34

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717) (*admitted pro hac vice*)  
Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)  
John A. Morris (NY Bar No. 2405397) (*admitted pro hac vice*)  
Gregory V. Demo (NY Bar No. 5371992) (*admitted pro hac vice*)  
Hayley R. Winograd (NY Bar No. 5612569) (*admitted pro hac vice*)  
10100 Santa Monica Blvd., 13th Floor  
Los Angeles, CA 90067  
Telephone: (310) 277-6910  
Facsimile: (310) 201-0760

HAYWARD PLLC

Melissa S. Hayward (TX Bar No. 24044908)  
MHayward@HaywardFirm.com  
Zachery Z. Annable (TX Bar No. 24053075)  
ZAnnable@HaywardFirm.com  
10501 N. Central Expy, Ste. 106  
Dallas, TX 75231  
Telephone: (972) 755-7100  
Facsimile: (972) 755-7110

*Counsel for the Debtor and Debtor-in-Possession*

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

In re:	)	)	)	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., <sup>1</sup>	)	)	)	)	Case No. 19-34054-sgj11
Debtor.	)	)	)	)	

**DEBTOR'S AMENDED WITNESS AND EXHIBIT LIST WITH RESPECT  
TO EVIDENTIARY HEARING TO BE HELD ON JUNE 8, 2021**

Highland Capital Management, L.P. (the "Debtor") submits the following amended witness and exhibit list with respect to the *Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders* [Docket No. 2255]

<sup>1</sup> The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



(the “Show Cause Order”), which the Court has set for hearing at 9:30 a.m. (Central Time) on June 8, 2021 (the “Hearing”) in the above-styled bankruptcy case (the “Bankruptcy Case”).

**A. Witnesses:**

1. James Dondero;
2. Mark Patrick;
3. Grant Scott (by deposition designation);
4. Gregory V. Demo;<sup>2</sup>
5. Any witness identified by or called by any other party; and
6. Any witness necessary for rebuttal.

**B. Exhibits:**

Letter	Exhibit	Offered	Admitted
1.	Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith [Docket No. 2237-1]		
2.	Declaration of John A. Morris in Support of Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith [Docket No. 2237-2]		
3.	Exhibit A, the [Proposed] Order on the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith [Docket No. 2237-3]		
4.	James Dondero’s Objection to Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest [Docket No. 2237-4]		
5.	Objection to Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith [Docket No. 2237-5]		

<sup>2</sup> If needed, Mr. Demo will be called as a witness for the sole purpose of authenticating Exhibits 54 and 55, time records from Pachulski Stang Ziehl & Jones, LLP relating to the Show Cause Order.

Letter	Exhibit	Offered	Admitted
6.	CLO Holdco's Objection to HarbourVest Settlement. [Docket No. 2237-6]		
7.	Notice of Deposition to James Dondero [Docket No. 2237-7]		
8.	Transcript of January 11, 2021 Deposition of Michael Pugatch [Docket No. 2237-8]		
9.	Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith [Docket No. 2237-9]		
10.	Transcript of January 14, 2021 Hearing [Docket No. 2237-10]		
11.	Order Approving Debtor's Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith [Docket No. 2237-11]		
12.	Original Complaint (Charitable DAF Fund, L.P. v. Highland Capital Management, L.P., Case No. 21-cv-00842, U.S. District Court Northern District of TX) (GScott000389) [Dondero June 1, 2021 Deposition Exhibit 7] [Docket No. 2237-12]		
13.	Email string dated April 19, 2021, between counsel for the Debtor and counsel for the plaintiffs in the DAF Action [Docket No. 2237-13]		
14.	Second email string dated April 19, 2021, between counsel for the Debtor and counsel for the plaintiffs in the DAF Action [Docket No. 2237-14]		
15.	Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course [Docket No. 2237-15]		
16.	Order Approving Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative <i>Nunc Pro Tunc</i> to March 15, 2020 [Docket No. 2237-16]		



Letter	Exhibit	Offered	Admitted
17.	Plaintiff's Motion for Leave to File First Amended Complaint (Charitable DAF Fund, L.P. v. Highland Capital Management, L.P., Case No. 21-cv-00842, U.S. District Court Northern District of TX) [Docket No. 2237-17]		
18.	CM/ECF Notice dated April 20, 2020 and lodged as Docket No. 8 in the DAF Action [Docket No. 2237-18]		
19.	Transcript of March 22, 2021 Hearing [Docket 2351-1]		
20.	Email from DAF counsel to Debtor's counsel dated April 20, 2021 [Docket 2351-2]		
21.	All communications between Debtor's counsel and the Bankruptcy Court courtroom deputy [Docket 2355-3]		
22.	Debtor's Motion for an Order to Enforce the Order of Reference [Docket 2351-4]		
23.	Transcript Designations from the January 21, 2021 Deposition of Grant Scott		
24.	Transcript Designations from the June 1, 2021 Deposition of Grant Scott		
25.	DAF/CLO Holdco Structure Chart (GScott000007) [Dondero June 1, 2021 Deposition Exhibit 1]		
26.	Amended and Restated Limited Liability Company Agreement of Charitable DAF GP, LLC, effective as of January 1, 2012 (PATRICK_000031) [Dondero June 1, 2021 Deposition Exhibit 2]		
27.	Amended and Restated Investment Advisory Agreement by and between Charitable DAF Fund, L.P., Charitable DAF GP, LLC, and HCMLP, effective July 1, 2014 (GScott000325) [Dondero June 1, 2021 Deposition Exhibit 3]		
28.	January 31, 2021 Meeting Appointment (GScott000011) [Dondero June 1, 2021 Deposition Exhibit 4]		
29.	Email chain re Grant Scott's notice of intent to resign (GScott000018) [Dondero June 1, 2021 Deposition Exhibit 5]		

Letter	Exhibit	Offered	Admitted
30.	Email chain re Highland Adherence Agreement in connection with HarbourVest shares (GScott000085) [Dondero June 1, 2021 Deposition Exhibit 6]		
31.	Email and attached A&R Service and Advisory Agreements and GP Resolutions (GScott000312) [Scott June 1, 2021 Deposition Exhibit 8]		
32.	Notice of CLO Holdco Settlement Agreement [Scott June 1, 2021 Deposition Exhibit 9]		
33.	Email between Grant Scott and Mark Patrick re Complaint (GScott000080) [Scott June 1, 2021 Deposition Exhibit 10]		
34.	Email chain re TerreStar Corporation Equity Investment and Residual Assets held by HOCF (GScott000138) [Scott June 1, 2021 Deposition Exhibit 11]		
35.	Email chain re request for information from Elysium Fund Management, Ltd. (GScott000361) [Scott June 1, 2021 Deposition Exhibit 12]		
36.	Assignment and Assumption of Membership Interest Agreement between Grant J. Scott and Mark E. Patrick dated March 24, 2021 (PATRICK_000006) [Scott June 1, 2021 Deposition Exhibit 13]		
37.	Written Resolutions of the Sole Director of the Company Dated March 25, 2021 (PATRICK_000003) [Scott June 1, 2021 Deposition Exhibit 14]		
38.	Written Shareholder Resolutions of the Sole Shareholder of the Company Made on March 24, 2021 (PATRICK_000012) [Scott June 1, 2021 Deposition Exhibit 15]		
39.	Written Shareholder Resolutions of the Sole Shareholder of the Company Made on March 31, 2021 (PATRICK_000001) [Scott June 1, 2021 Deposition Exhibit 16]		
40.	Written Shareholder Resolutions of the Sole Shareholder of the Company Made on April 2, 2021 (PATRICK_000002) [Scott June 1, 2021 Deposition Exhibit 17]		
41.	Amended and Restated Investment Advisory Agreement by and between Charitable DAF Fund, L.P., Charitable DAF GP, LLC, and HCMLP, effective July 1, 2014 (PATRICK_000923)		

Letter	Exhibit	Offered	Admitted
42.	Amended and Restated Service Agreement by and among HCMLP, Charitable DAF Fund, L.P., and Charitable DAF GP, LLC , effective July 1, 2014 (PATRICK_000938)		
43.	Email from Mark Patrick to Grant Scott dated April 6, 2021 re Urgent Questions (PATRICK_001129)		
44.	Original Complaint (Docket No. 1, PCMG Trading Partners XXIII, LP v. Highland Capital Management, L.P., Case No. 21-cv-01169, U.S. District Court Northern District of TX)		
45.	Defendant's Motion For Leave to Amend Answer (Docket No. 32, Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., Adv. Pro. No. 21-03004)		
46.	Email chain re NDA for D&O Insurance Quote (GScott000172)		
47.	Check Request dated April 7, 2021 (D1 Landscape & Irrigation) (GScott000354)		
48.	Check Request dated April 7, 2021 (Sanders Lawn & Maintenance) (GScott000355)		
49.	Check Request dated April 7, 2021 (BB Services) (GScott000358)		
50.	Highland Capital Management, L.P.'S Notice of Amended Subpoena to Grant Scott [Docket No. 2366]		
51.	Certificate of Service for Notice of Deposition of Grant Scott (Docket No. 41, Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., et al., Adv. Pro. No. 21-03000)		
52.	Email re Zoom Instructions for June 1, 2021 Deposition of Grant Scott		
53.	Email re Zoom Instructions for January 21, 2021 Deposition of Grant Scott		
54.	Pachulski Stang Billing Detail (April 18 – April 30, 2021)		
55.	Pachulski Stang Billing Detail (May 1 – June 7, 2021)		

Letter	Exhibit	Offered	Admitted
56.	Any document entered or filed in the Bankruptcy Case, including any exhibits thereto		
57.	All exhibits necessary for impeachment and/or rebuttal purposes		
58.	All exhibits identified by or offered by any other party at the Hearing		

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Dated: June 7, 2021.

**PACHULSKI STANG ZIEHL & JONES LLP**

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Jeffrey N. Pomerantz (CA Bar No.143717)  
Ira D. Kharasch (CA Bar No. 109084)  
John A. Morris (NY Bar No. 2405397)  
Gregory V. Demo (NY Bar 5371992)  
Hayley R. Winograd (NY Bar No. 5612569)  
10100 Santa Monica Blvd., 13th Floor  
Los Angeles, CA 90067  
Telephone: (310) 277-6910  
Facsimile: (310) 201-0760  
E-mail: [jpomerantz@pszjlaw.com](mailto:jpomerantz@pszjlaw.com)  
[ikharasch@pszjlaw.com](mailto:ikharasch@pszjlaw.com)  
[jmorris@pszjlaw.com](mailto:jmorris@pszjlaw.com)  
[gdemo@pszjlaw.com](mailto:gdemo@pszjlaw.com)

-and-

**HAYWARD PLLC**

/s/ Zachery Z. Annable  
Melissa S. Hayward  
Texas Bar No. 24044908  
[MHayward@HaywardFirm.com](mailto:MHayward@HaywardFirm.com)  
Zachery Z. Annable  
Texas Bar No. 24053075  
[ZAnnable@HaywardFirm.com](mailto:ZAnnable@HaywardFirm.com)  
10501 N. Central Expy, Ste. 106  
Dallas, Texas 75231  
Tel: (972) 755-7100  
Fax: (972) 755-7110

*Counsel for Highland Capital Management, L.P.*

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## **EXHIBIT 54**

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**Pachulski Stang Ziehl & Jones LLP**

10100 Santa Monica Blvd.  
13th Floor  
Los Angeles, CA 90067

Board of Directors  
Highland Capital Management LP  
300 Crescent Court ste. 700  
Dallas, TX 75201

April 30, 2021  
Invoice 127680  
Client 36027  
Matter 00002  
**JNP**

RE: Postpetition

**STATEMENT OF PROFESSIONAL SERVICES RENDERED THROUGH 04/30/2021**

FEES	\$1,286,897.00
EXPENSES	\$8,173.58
<b>TOTAL CURRENT CHARGES</b>	<b>\$1,295,070.58</b>
<b>BALANCE FORWARD</b>	<b>\$5,472,625.24</b>
<b>LAST PAYMENT</b>	<b>\$3,187,420.34</b>
<b>TOTAL BALANCE DUE</b>	<b>\$3,580,275.48</b>

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Highland Capital Management LP  
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Invoice 127680  
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				<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
04/18/2021	GVD	BL	Draft summary of DAF litigation to I. Pachulski	0.90	950.00	\$855.00
04/19/2021	IDK	BL	Numerous E-mails with J Pomerantz, others re DAF lawyers correspondence to add CEO to DAF lawsuit, and how to respond (.3); Telephone conferences with J Pomerantz re same (.3); Review of correspondence with J Pomerantz and DAF lawyers re our response to their request and potential contempt, and their feedback re same on no violation of prior court orders (.2).	0.80	1325.00	\$1,060.00
04/19/2021	IDK	BL	E-mails with J Pomerantz re DAF District Court action and related issues (.4); E-mails with R Saunders re same and timing, including list of issues to research and relevant documents for same (.5).	0.90	1325.00	\$1,192.50
04/19/2021	JNP	BL	Conference with J. Dubel regarding District Court DAF litigation and related issues (several).	0.40	1295.00	\$518.00
04/19/2021	JNP	BL	Review and respond to various emails from counsel for DAF regarding District Court litigation.	0.30	1295.00	\$388.50
04/19/2021	JNP	BL	Conference with Ira D. Kharasch and then John A. Morris regarding DAF District Court litigation.	0.30	1295.00	\$388.50
04/19/2021	JNP	BL	Emails to Board regarding DAF District Court litigation.	0.30	1295.00	\$388.50
04/19/2021	JNP	BL	Conference with John A. Morris and J. Seery regarding DAF District Court litigation.	0.40	1295.00	\$518.00



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04/19/2021	JAM	BL	Tephone conference with J. Pomerantz re: DAF lawsuit (0.1); review e-mails between J. Pomerantz and counsel to the DAF re: DAF intention to name Seery as a defendant (0.2); telephone conference with J. Seery, J. Pomerantz re: DAF intention to name Seery as a defendant (0.4).	0.70	1245.00	\$871.50
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				<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
04/20/2021	IDK	BL	E-mails with R Saunders re DAF action and prioritizing various issues re same (.2); Review of DAF motion for leave to amend and add CEO and D Court denial of same (.3); Review of correspondence with Board, J Pomerantz re same (.1).	0.60	1325.00	\$795.00
04/20/2021	JNP	BL	Conference with J. Dubel regarding DAF litigation and related.	0.30	1295.00	\$388.50
04/20/2021	JNP	BL	Review DAF motion to amend to add Seery as defendant.	0.20	1295.00	\$259.00
04/20/2021	JNP	BL	Conference with John A. Morris regarding DAF motion to amend and response.	0.10	1295.00	\$129.50
04/20/2021	JNP	BL	Conference with John A. Morris regarding DAF District Court lawsuit and employee claims litigation issues.	0.50	1295.00	\$647.50
04/20/2021	JNP	BL	Conference with J. Dubel regarding DAF District Court lawsuit.	0.30	1295.00	\$388.50

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				<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
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04/20/2021	JAM	BL	Telephone conference with J. Pomerantz re: DAF complaint and strategy concerning the same (0.5); outline of issues for contempt motion concerning DAF complaint/Seery (0.8).	1.30	1245.00	\$1,618.50
04/20/2021	JAM	BL	Review DAF complaint (0.4); telephone conference with J. Seery re: DAF complaint and related matters (0.2); research re: factual issues concerning DAF complaint (0.3); e-mail to J. Seery, J. Pomerantz re: factual issues concerning DAF complaint (0.2).	1.10	1245.00	\$1,369.50

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				<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
04/20/2021	GVD	BL	Review DAF/CLOH lawsuit	0.50	950.00	\$475.00

04/21/2021	IDK	BL	Telephone conference with J Pomerantz re DAF action issues (.1).	0.10	1325.00	\$132.50
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04/21/2021	JNP	BL	Conference with John A. Morris regarding potential contempt motion.	0.20	1295.00	\$259.00
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04/21/2021	JHD	BL	Correspondence from Ira D. Kharasch re DAF litigation; correspondence from Isaac M. Pachulski re same; correspondence from Gregory V. Demo re same	0.30	1645.00	\$493.50
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04/21/2021	JHD	BL	Research re DAF litigation issues; prepare	0.80	1645.00	\$1,316.00
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	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
correspondence to Ira D. Kharasch re same;			
correspondence from Ira D. Kharasch re same			

04/22/2021	JNP	BL	Review motion for contempt.	0.30	1295.00	\$388.50
04/22/2021	JNP	BL	Conference with John A. Morris regarding motion for contempt.	0.20	1295.00	\$259.00

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				<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
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04/22/2021	JAM	BL	Work on DAF contempt motion (9.7); e-mails with J. Pomerantz, I. Kharasch, G. Demo, H. Winograd re: draft DAF contempt motion (0.2); telephone conference with J. Pomerantz re: draft DAF	10.00	1245.00	\$12,450.00
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04/22/2021	HRW	BL	Draft motion for order to show cause and ancillary documents for DAF contempt motion (2.5); Draft witness and exhibit list for trial on Dondero adversary proceeding for injunctive relief (0.6); Call with J. Morris re: DAF contempt motion (0.1); Call with J. Morris, T. Surgent, and G. Demo re: discovery responses (0.2).	3.40	695.00	\$2,363.00
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				Hours	Rate	Amount
04/23/2021	JNP	BL	Conference with John A. Morris regarding DAF litigation and motion for contempt.	0.20	1295.00	\$259.00
04/23/2021	JNP	BL	Review final version of contempt motion.	0.20	1295.00	\$259.00
04/23/2021	JMF	BL	Review contempt pleadings.	0.40	1050.00	\$420.00
04/23/2021	GVD	BL	Review motion for contempt	0.50	950.00	\$475.00
04/23/2021	GVD	BL	Correspondence with counsel to HCLOF re contempt motion	0.20	950.00	\$190.00
04/23/2021	GVD	BL	Conference with J. Morris re next steps on contempt motion	0.20	950.00	\$190.00
04/23/2021	GVD	BL	Conference with J. Morris re status of contempt motion	0.20	950.00	\$190.00
04/23/2021	HRW	BL	Review DAF/CLO Holdco Contempt Motion.	0.60	695.00	\$417.00

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				<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
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04/24/2021	HRW	BL	Review DAF/CLO Holdco motion to amend complaint.	0.40	695.00	\$278.00
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04/26/2021	IDK	BL	Review of correspondence with Wilmer Hale on DAF action and related federal law issues for their review and coordination of call re same (.2); Review of further R Saunders memo/research on DAF and enforcing the reference re same (.3).	0.50	1325.00	\$662.50
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04/26/2021	JNP	BL	Conference with J. Dubel regarding contempt motion and related issues.	0.20	1295.00	\$259.00
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Hours Rate Amount



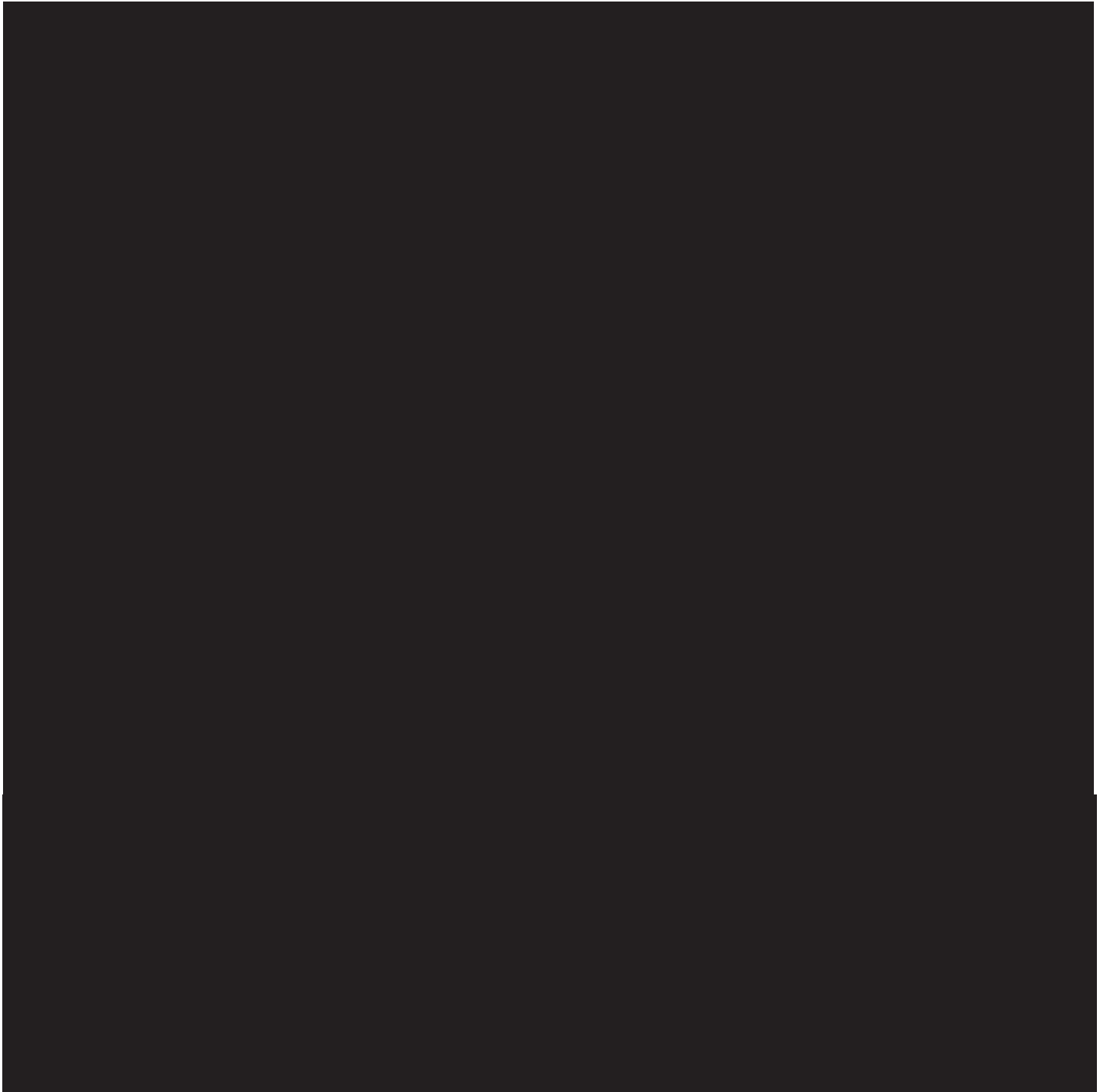
04/26/2021	JAM	BL	E-mail to T. Ellison, J. Pomerantz, G. Demo, M. Heyward re: hearing date for contempt motion (0.2); telephone conference with J. Pomerantz re: e-mail to Ms. Ellsion concerning contempt hearing (0.2); telephone conference with J. Seery re: possible motion for Rule 11 sanctions (0.1); telephone conference with J. Pomerantz, R. Feinstein, T. Silva re: possible defenses to DAF complaint (0.4).	0.90	1245.00	\$1,120.50
04/26/2021	JAM	BL	Telephone conference with J. Pomerantz, G. Demo, King & Spalding re: DAF litigation matters (0.4); telephone conference with J. Seery, J. Pomerantz re: litigation matters (0.5)	0.90	1245.00	\$1,120.50

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04/27/2021	IDK	BL	E-mails with J Morris, others on court's email setting contempt hearing as live hearing.	0.20	1325.00	\$265.00
04/27/2021	IDK	BL	E-mails with R Saunders, J Pomerantz re DAF	0.30	1325.00	\$397.50

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action and Barton doctrine re same.



04/27/2021	JNP	BL	Conference with John A. Morris regarding email to court regarding contempt motion.	0.10	1295.00	\$129.50
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04/27/2021	JAM	BL	Communications with T. Ellison, J. Pomerantz, Z. Annable re: notice of motion for contempt hearing (DAF) (0.2) draft notice of hearing for contempt motion (0.3); e-mails with Z. Annable, J. Pomerantz, G. Demo, H. Winograd re: notice of hearing for contempt motion (0.2); e-mails with M. Sbaiti, C. Taylor re: notice of motion for contempt hearing and related matters (0.4).	1.10	1245.00	\$1,369.50
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04/28/2021	JNP	BL	Conference with J. Dubel regarding contempt motion and related issues (2x).	0.20	1295.00	\$259.00
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				<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
04/28/2021	JAM	BL	Communications with Z. Annable, J. Pomerantz, G. Demo, H. Winograd re: Order to Show Cause (0.3); review/revise Order to Show Cause (0.2).	0.50	1245.00	\$622.50

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APR 10 1968



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APR 10 1968

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## **EXHIBIT 55**

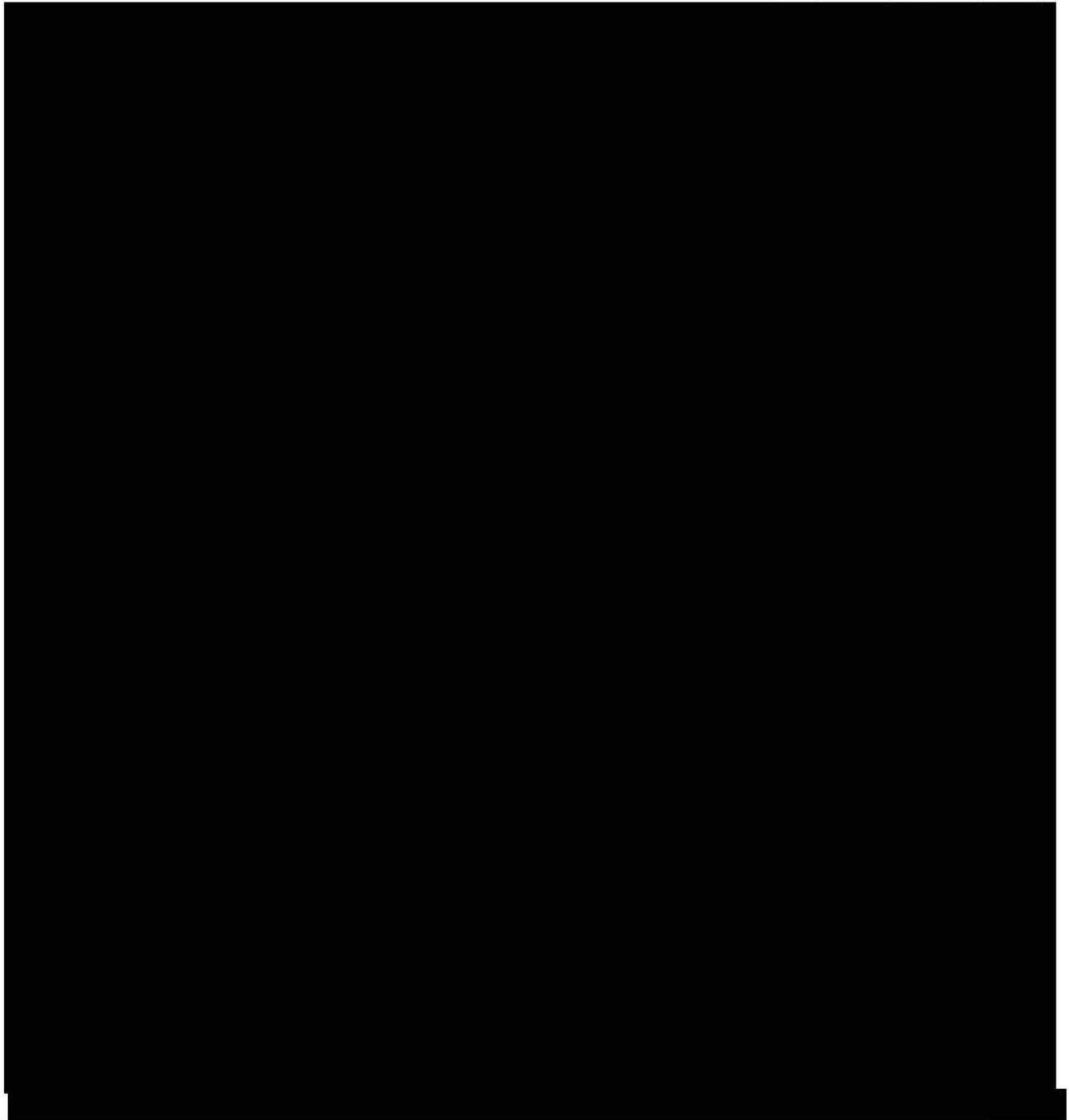
Case 19-34054-sgj11 Doc 2421-2 Filed 06/07/21 Entered 06/07/21 20:02:45 Page 2 of 34

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June 07, 2021

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<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
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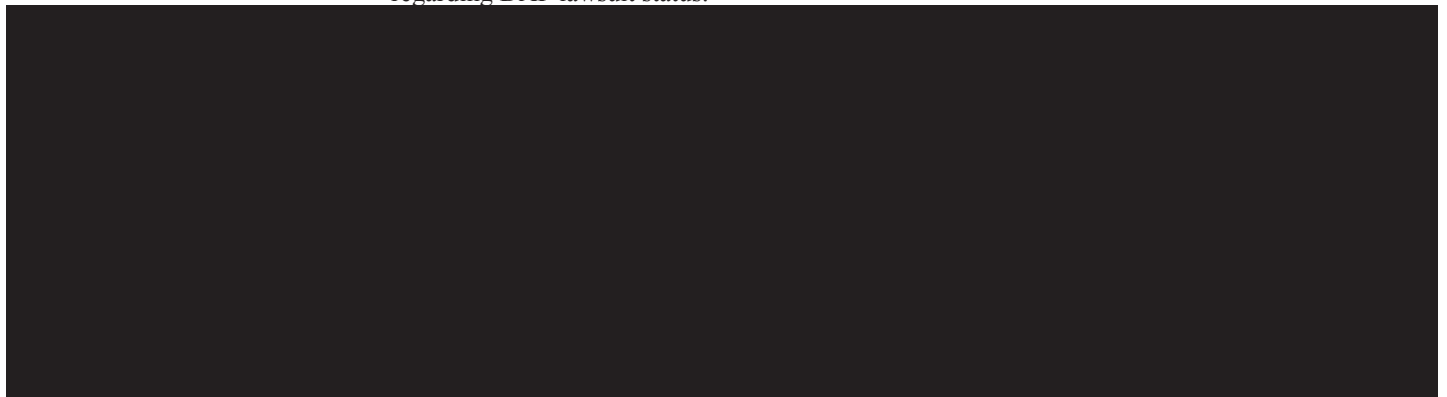
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05/05/2021	JNP	DAF	Conference with King and Spalding and PSZJ regarding DAF lawsuit status.	0.40	1295.00	\$518.00
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Pachulski Stang Ziehl & Jones LLP  
Highland Capital Management LP  
36027 -00002

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Prebill#283067  
June 07, 2021

					<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
RJF Bill	05/05/2021	DAF	0.40	0.40	1,395.00		558.00
05/05/2021	RJF	DAF	Telephone conference with Jeffrey N. Pomerantz, Gregory V. Demo and John A. Morris regarding complaint.		0.40	1395.00	\$558.00
RJF Bill	05/05/2021	DAF	0.40	0.40	1,395.00		558.00
05/05/2021	RJF	DAF	Call with CLO Holdco's attorney regarding case status.		0.40	1395.00	\$558.00
RJF Bill	05/05/2021	DAF	0.40	0.40	1,395.00		558.00
05/05/2021	RJF	DAF	Research response date, related emails, civil action coversheet.		0.40	1395.00	\$558.00
JAM Bill	05/05/2021	DAF	1.00	1.00	1,245.00		1,245.00
05/05/2021	JAM	DAF	Telephone conference with J. Pomerantz, R. Feinstein, G. Demo re: strategic issues concerning DAF litigation (0.4); telephone conference with J. Pomerantz, G. Demo, M. Maloney re: DAF litigation issues including service of process and timing (0.4); research re: Rule 11 motion (0.2).		1.00	1245.00	\$1,245.00

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Hours	Rate	Amount
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				Hours	Rate	Amount	
HRW Bill	05/06/2021	DAF		1.20	1.20	695.00	834.00
05/06/2021	HRW	DAF	Research re: meaning of “related to” on civil cover sheet for DAF/CLO Holdco litigation (1.2).	1.20	695.00	\$834.00	
05/07/2021	JAM	DAF	Telephone conference with J. Pomerantz, R. Feinstein, G. Demo re: strategic issues concerning DAF Action, including responding to complaint and timing of related motions (0.8).	0.80	1245.00	\$996.00	
GVD Bill	05/07/2021	DAF		0.80	0.80	950.00	760.00
05/07/2021	GVD	DAF	Conference with PSZJ team re planning for DAF action response	0.80	950.00	\$760.00	

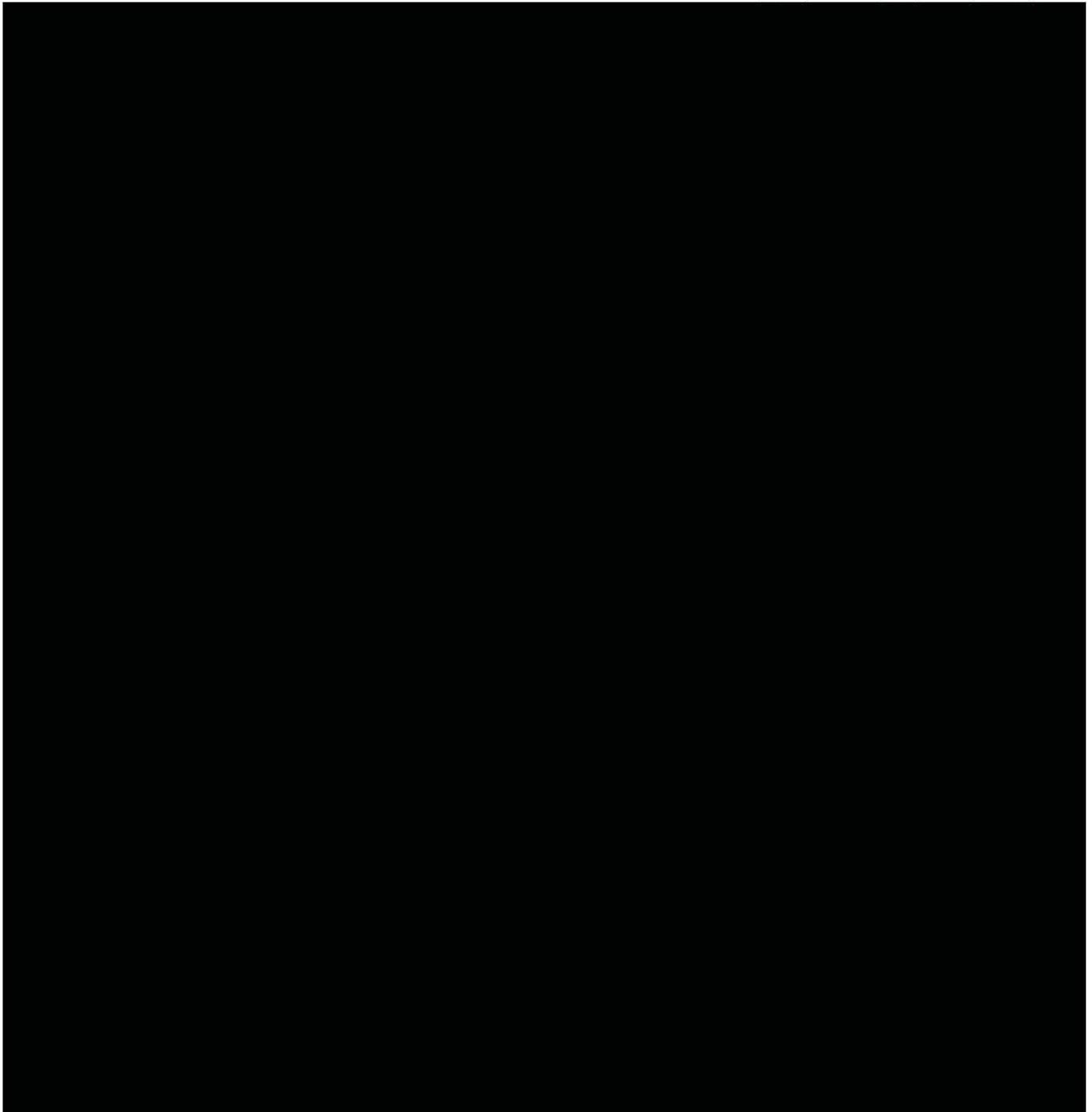
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The following table shows the results of the regression analysis for the dependent variable "Number of publications" (Y) against the independent variables "Gender" (X1) and "Age" (X2). The model is:  $Y = \beta_0 + \beta_1 X_1 + \beta_2 X_2 + \epsilon$ .

Variable	Parameter	Estimate	Standard Error	t-statistic	p-value
Intercept	$\beta_0$	1.5	0.5	3.0	0.002
Gender (Male)	$\beta_1$	0.5	0.2	2.5	0.015
Age (Years)	$\beta_2$	-0.1	0.05	-2.0	0.045

The adjusted R-squared value is 0.75, indicating that 75% of the variance in the number of publications is explained by the model.

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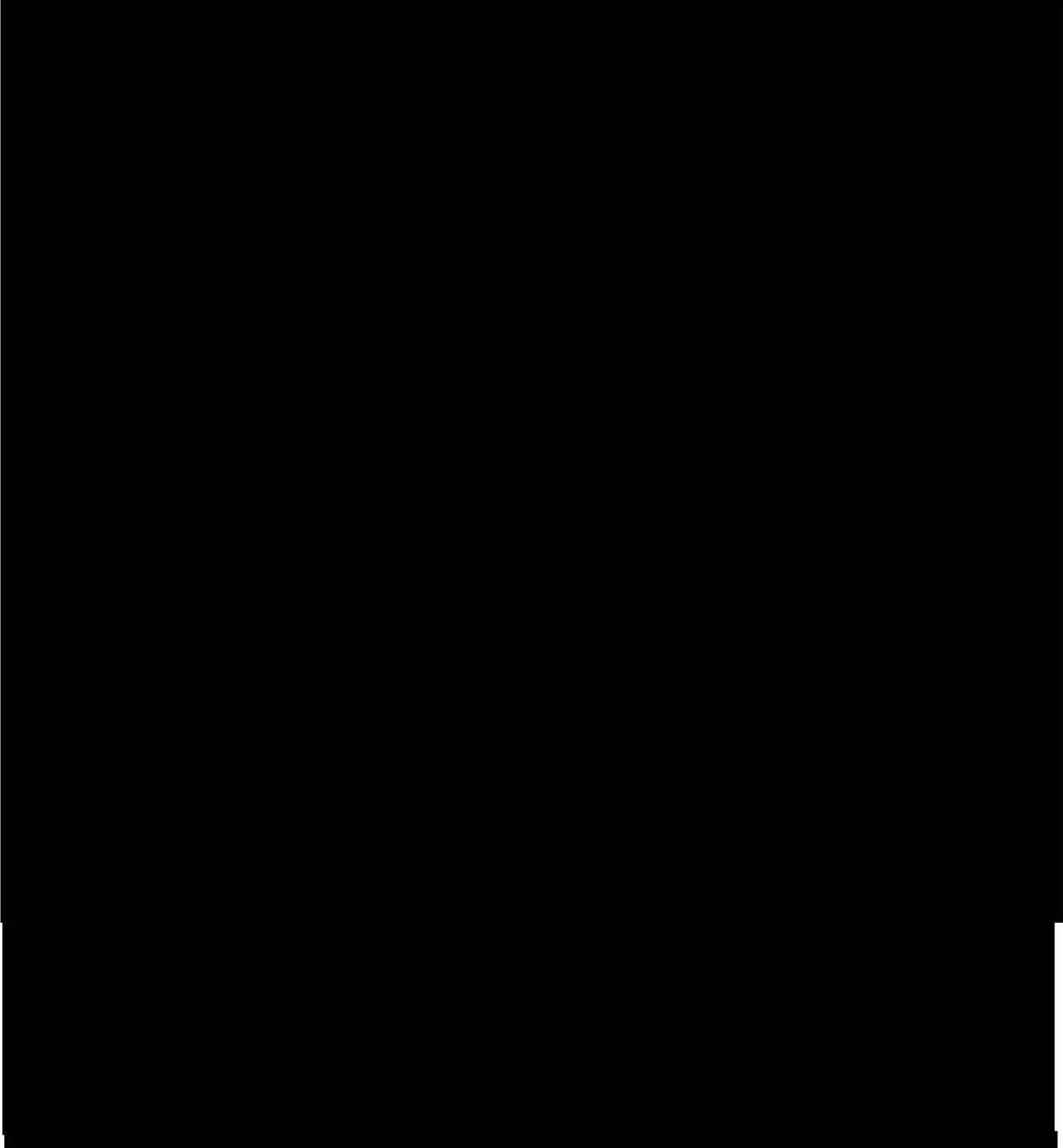
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					Hours	Rate	Amount
JE	05/11/2021	DAF	8.70	8.70	1,195.00		10,396.50
Bill							
05/11/2021	JE	DAF	Review draft revisions to objection from Mr. Pomerantz and review and revise same accordingly (7.7); call with Mr. Demo regarding reference and contempt pleadings (.2); review contempt pleadings and applicable documents attached to contempt pleadings for fact section (.8).		8.70	1195.00	\$10,396.50

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					Hours	Rate	Amount	
JNP Bill	05/14/2021	DAF	0.10	0.10	1,295.00		129.50	
05/14/2021	JNP	DAF	Conference with John A. Morris regarding discovery regarding contempt motion and related.			0.10	1295.00	\$129.50
JNP Bill	05/14/2021	DAF	0.20	0.20	1,295.00		259.00	
05/14/2021	JNP	DAF	Review discovery regarding contempt motion and provide comments.			0.20	1295.00	\$259.00
JNP Bill	05/14/2021	DAF	0.30	0.30	1,295.00		388.50	
05/14/2021	JNP	DAF	Review responses to contempt motion filed by various parties.			0.30	1295.00	\$388.50
05/14/2021	JAM	DAF	Preliminary review of objection to contempt motion (0.4); telephone conference with J. Pomerantz re: objections to contempt motion (0.2).			0.60	1245.00	\$747.00



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				Hours	Rate	Amount	
JAM	05/15/2021	DAF	6.30	6.30	1,245.00	7,843.50	
Bill							
05/15/2021	JAM	DAF	Draft document requests for Dondero, Patrick, CLO Holdco/DAF for contempt proceeding (3.6); e-mails to J. Pomerantz, I. Kharasch, G. Demo, H. Winograd re: draft document requests for Dondero, Patrick, CLO Holdco/DAF for contempt proceeding (0.2); telephone conference with J. Dubel re: objections to contempt motion and related matters (0.7); revisions to draft document requests for Dondero, Patrick, CLO Holdco/DAF for contempt proceeding (0.6); e-mails to J. Seery, J. Pomerantz, I. Kharasch, G. Demo, H. Winograd re: draft document requests for Dondero, Patrick, CLO Holdco/DAF for contempt proceeding (0.2); draft subpoena for Grant Scott (0.4); telephone conference with J. Seery re: discovery in connection with contempt motion (0.2); telephone conference with G. Demo re: discovery in connection with contempt motion (0.1); e-mails to counsel for Violators re: discovery in connection with contempt motion (0.3).		6.30	1245.00	\$7,843.50
GVD	05/15/2021	DAF	0.20	0.20	950.00	190.00	
Bill							
05/15/2021	GVD	DAF	Review draft discovery requests re contempt hearing		0.20	950.00	\$190.00
GVD	05/15/2021	DAF	0.30	0.30	950.00	285.00	
Bill							
05/15/2021	GVD	DAF	Review responses to order to show cause		0.30	950.00	\$285.00
JE	05/16/2021	DAF	1.60	1.60	1,195.00	1,912.00	
Bill							
05/16/2021	JE	DAF	Review responses of DAF and others to Order to show cause, look at certain cited case law and		1.60	1195.00	\$1,912.00

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correspondence with team regarding same.

					Hours	Rate	Amount
IDK Bill	05/17/2021	DAF	0.80	0.80	1,325.00		1,060.00
05/17/2021	IDK	DAF	Attend conference call with J Pomerantz, others re DAF opposition to OSC re contempt, contempt powers, damages and reply issues (.6); E-mails with J Morris, others re same DAF opposition and related errant E-mail issue (.2).		0.80	1325.00	\$1,060.00
IDK Bill	05/17/2021	DAF	1.00	1.00	1,325.00		1,325.00
05/17/2021	IDK	DAF	Attend conference call with J Pomerantz, others on DAF and OSC as well as other litigation matters (1.0).		1.00	1325.00	\$1,325.00
JNP Bill	05/17/2021	DAF	0.60	0.60	1,295.00		777.00
05/17/2021	JNP	DAF	Conference with PSZJ team regarding contempt reply.		0.60	1295.00	\$777.00
JNP Bill	05/17/2021	DAF	0.10	0.10	1,295.00		129.50
05/17/2021	JNP	DAF	Conference with R. Nelms regarding contempt issues.		0.10	1295.00	\$129.50
JNP Bill	05/17/2021	DAF	1.40	1.40	1,295.00		1,813.00
05/17/2021	JNP	DAF	Detailed review of DAF response to contempt motion and draft comments thereto.		1.40	1295.00	\$1,813.00
JNP Bill	05/17/2021	DAF	0.10	0.10	1,295.00		129.50
05/17/2021	JNP	DAF	Conference with John A. Morris regarding DAF contempt issues.		0.10	1295.00	\$129.50

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					Hours	Rate	Amount
JNP	05/17/2021	DAF	0.50	0.50	1,295.00		647.50
Bill							
05/17/2021	JNP	DAF	Conference with PSZJ team regarding DAF response.	0.50	1295.00		\$647.50
JNP	05/17/2021	DAF	0.40	0.40	1,295.00		518.00
Bill							
05/17/2021	JNP	DAF	Conference with R. Nelms and John A. Morris regarding contempt issues.	0.40	1295.00		\$518.00
JNP	05/17/2021	DAF	0.20	0.20	1,295.00		259.00
Bill							
05/17/2021	JNP	DAF	Conference with John A. Morris regarding contempt reply.	0.20	1295.00		\$259.00
JNP	05/17/2021	DAF	0.10	0.10	1,295.00		129.50
Bill							
05/17/2021	JNP	DAF	Emails regarding jurisdiction regarding DAF proceeding.	0.10	1295.00		\$129.50
JNP	05/17/2021	DAF	0.20	0.20	1,295.00		259.00
Bill							
05/17/2021	JNP	DAF	Consider issues regarding pending contempt motion.	0.20	1295.00		\$259.00
RJF	05/17/2021	DAF	0.80	0.80	1,395.00		1,116.00
Bill							
05/17/2021	RJF	DAF	Review opposition to contempt motion, related emails.	0.80	1395.00		\$1,116.00
RJF	05/17/2021	DAF	0.50	0.50	1,395.00		697.50
Bill							
05/17/2021	RJF	DAF	Internal call regarding contempt motion.	0.50	1395.00		\$697.50
JAM	05/17/2021	DAF	2.00	2.00	1,245.00		2,490.00
Bill							
05/17/2021	JAM	DAF	E-mails with L. Phillips, M. Sbaiti, others re:	2.00	1245.00		\$2,490.00

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					<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
			discovery (0.3); telephone conference with J. Pomerantz, J. Elkin, G. Demo, I. Kharasch re: legal and factual issues concerning Contempt Motion (0.6); telephone conference with J. Pomerantz, J. Elkin, G. Demo, I. Kharasch, R. Feinstein re: legal and factual issues concerning Contempt Motion (0.7); telephone conference with J. Pomerantz, R. Nelms re: DAF contempt issues (0.4).				
GVD	05/17/2021	DAF		0.70	0.70	950.00	665.00
Bill							
05/17/2021	GVD	DAF	Conference with PSZJ re reply to responses to order to show cause		0.70	950.00	\$665.00
GVD	05/17/2021	DAF		0.60	0.60	950.00	570.00
Bill							
05/17/2021	GVD	DAF	Conference (internal) re contempt motion and next steps		0.60	950.00	\$570.00
GVD	05/17/2021	DAF		0.30	0.30	950.00	285.00
Bill							
05/17/2021	GVD	DAF	Review contempt motions re research issues		0.30	950.00	\$285.00
JE	05/17/2021	DAF		5.00	5.00	1,195.00	5,975.00
Bill							
05/17/2021	JE	DAF	Call with PSZJ team to discuss show cause reply (.6); second call with PSZJ team to discuss show cause reply (.8); review comments of Mr. Pomerantz and Mr. Feinstein regarding reply (.4); research issues for reply on civil contempt and jurisdiction (3.2).		5.00	1195.00	\$5,975.00
IDK	05/18/2021	DAF		0.30	0.30	1,325.00	397.50
Bill							
05/18/2021	IDK	DAF	Attend part of conference call with J Pomerantz,		0.30	1325.00	\$397.50

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					<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
			others on contempt motion and opposition thereto and potential response				
JNP Bill	05/18/2021	DAF		0.70 0.70	1,295.00		906.50
05/18/2021 JNP DAF			Conference with PSZJ team regarding DAF contempt reply.		0.70	1295.00	\$906.50
RJF Bill	05/18/2021	DAF		0.70 0.70	1,395.00		976.50
05/18/2021 RJF DAF			Call with Jeffrey N. Pomerantz, Gregory V. Demo, Judith Elkin, John A. Morris regarding DAF contempt reply.		0.70	1395.00	\$976.50
05/18/2021 RJF DAF			Review Villegas case.		0.20	1395.00	\$279.00
RJF Bill	05/18/2021	DAF		0.30 0.30	1,395.00		418.50
05/18/2021 RJF DAF			Review Elkin contempt research, related emails.		0.30	1395.00	\$418.50
JAM Bill	05/18/2021	DAF		1.10 1.10	1,245.00		1,369.50
05/18/2021 JAM DAF			Telephone conference with J. Elkin re: issues concerning reply brief for Contempt motion (0.4); telephone conference with J. Pomerantz, I. Kharasch, R. Feinstein, J. Elkin, G. Demo re: reply brief on contempt motion (0.7).		1.10	1245.00	\$1,369.50
GVD Bill	05/18/2021	DAF		0.70 0.70	950.00		665.00
05/18/2021 GVD DAF			Conference with PSZJ working group re contempt proceedings		0.70	950.00	\$665.00
JE Bill	05/18/2021	DAF		6.90 6.90	1,195.00		8,245.50
05/18/2021 JE DAF			Call with team regarding show cause reply (.7); research various issues raised in show cause		6.90	1195.00	\$8,245.50

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			response (5.8); call with Mr. Morris regarding fact					
JNP	05/19/2021	DAF		1.00	1.00	1,295.00		1,295.00
Bill								
05/19/2021	JNP	DAF	Review and revise sections of contempt reply brief.	1.00		1295.00		\$1,295.00
05/19/2021	RJF	DAF	Comment on deposition notices to DAF and CLC.	0.20		1395.00		\$279.00
RJF	05/19/2021	DAF		0.40	0.40	1,395.00		558.00
Bill								
05/19/2021	RJF	DAF	Research regarding contempt, related emails.	0.40		1395.00		\$558.00
JAM	05/19/2021	DAF		8.10	8.10	1,245.00		10,084.50
Bill								
05/19/2021	JAM	DAF	Prepare notice of deposition for Mark Patrick (0.3);	8.10		1245.00		\$10,084.50

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			e-mails with Z. Annable, H. Winograd re: Patrick notice of deposition (0.1); prepare Rule 30(b)(6) deposition notice for DAF/CLO Holdco (0.6); e-mails with J. Pomerantz, R. Feinstein, G. Demo, Z. Annable re: Rule 30(b)(6) deposition notice for DAF/CLO Holdco (0.1); work on reply brief for contempt motion (6.8); e-mails with L. Phillips, others re: depositions (0.1); e-mail to J. Pomerantz, R. Feinstein, J. Elkin re: reply brief for contempt motion (0.1).				
GVD	05/19/2021	DAF		0.10	0.10	950.00	95.00
Bill							
05/19/2021	GVD	DAF	Correspondence with J. Elkin re contempt motion		0.10	950.00	\$95.00
JE	05/19/2021	DAF		13.30	13.30	1,195.00	15,893.50
Bill							
05/19/2021	JE	DAF	Review and comment on discovery notice (.3); review cases cited by DAF in brief (2.3); work on reply brief and miscellaneous correspondence with Mr. Morris and Mr. Pomerantz regarding same (10.7).		13.30	1195.00	\$15,893.50
JNP	05/20/2021	DAF		1.00	1.00	1,295.00	1,295.00
Bill							
05/20/2021	JNP	DAF	Review and revise reply regarding contempt motion.		1.00	1295.00	\$1,295.00
JAM	05/20/2021	DAF		5.10	5.10	1,245.00	6,349.50
Bill							
05/20/2021	JAM	DAF	Continued work on reply brief on contempt motion (4.5); telephone conference with J. Elkin re: reply brief on contempt motion (0.2); e-mails to counsel for the alleged Violators re: discovery (0.2); review document requests (0.1); telephone conference with J. Pomerantz re: document requests (0.1).		5.10	1245.00	\$6,349.50
GVD	05/20/2021	DAF		0.30	0.30	950.00	285.00

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						Hours	Rate	Amount
Bill								
05/20/2021	GVD	DAF	Review reply to contempt motion			0.30	950.00	\$285.00
JE	05/20/2021	DAF		13.10	13.10	1,195.00		15,654.50
Bill								
05/20/2021	JE	DAF	Work on reply brief (11.0); review motion to amend complaint (.4); call with Mr. Morris regarding briefing (.3); research judgment issues (1.4).			13.10	1195.00	\$15,654.50
JNP	05/21/2021	DAF		1.00	1.00	1,295.00		1,295.00
Bill								
05/21/2021	JNP	DAF	Emails and review and revised reply regarding contempt motion.			1.00	1295.00	\$1,295.00
RJF	05/21/2021	DAF		0.50	0.50	1,395.00		697.50
Bill								
05/21/2021	RJF	DAF	Review and comment on contempt motion reply.			0.50	1395.00	\$697.50
JAM	05/21/2021	DAF		4.50	4.50	1,245.00		5,602.50
Bill								
05/21/2021	JAM	DAF	E-mails to counsel for the Violators re: discovery (0.2); review/revise draft reply on Contempt Motion (3.3); e-mail to J. Seery, PSZJ team re: draft Reply on Contempt Motion (0.1); telephone conference with G. Demo re: facts concerning contempt motion (0.1); review/revise draft Reply on Contempt Motion (0.4); communications with J. Elkin, H. Winograd, Z. Annable re: Reply and supporting declaration on Contempt Motion (0.2); revise subpoena for Grant Scott (0.1); e-mails with J. Kane, J. Pomerantz, G. Demo, H. Winograd re: Scott subpoena (0.1)			4.50	1245.00	\$5,602.50
GVD	05/21/2021	DAF		1.50	1.50	950.00		1,425.00
Bill								
05/21/2021	GVD	DAF	Review draft reply to contempt motion			1.50	950.00	\$1,425.00
GVD	05/21/2021	DAF		0.10	0.10	950.00		95.00
Bill								
05/21/2021	GVD	DAF	Conference with J. Morris re contempt reply			0.10	950.00	\$95.00



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HRW	05/21/2021	DAF	1.20	1.20	695.00	834.00
Bill						

05/21/2021 HRW DAF Prepare declaration and gather exhibits for reply in support of DAF contempt motion (1.2). 1.20 695.00 \$834.00



JE	05/22/2021	DAF	0.60	0.60	1,195.00	717.00
Bill						

05/22/2021 JE DAF Miscellaneous correspondence regarding preparation for hearings on Motion to Modify and Contempt Motion. 0.60 1195.00 \$717.00



JNP	05/23/2021	DAF	0.60	0.60	1,295.00	777.00
Bill						

05/23/2021 JNP DAF Conference with John A. Morris and M. Sbaiti regarding discovery. 0.60 1295.00 \$777.00

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					Hours	Rate	Amount
JNP	05/23/2021	DAF	0.10	0.10	1,295.00		129.50
Bill							
05/23/2021	JNP	DAF	Review email from M. Sbaiti; Conference with John A. Morris regarding same.	0.10	1295.00		\$129.50
JAM	05/23/2021	DAF	1.40	1.40	1,245.00		1,743.00
Bill							
05/23/2021	JAM	DAF	Prepare Notice of Service of Subpoena (Grant Scott) (0.2); e-mails to J. Seery, T. Surgent, J. Pomerantz, Z. Annable re: subpoena for Scott (0.2); e-mail to C. Taylor, J. Bonds, J. Pomerantz, G. Demo, H. Winograd re: discovery in connection with contempt motion (0.3); meet and confer call with J. Pomerantz, M. Sbaiti re: Violators' document requests and related matters (0.5); telephone conference with J. Pomerantz re: discovery requests (0.2).	1.40	1245.00		\$1,743.00
IDK	05/24/2021	DAF	0.30	0.30	1,325.00		397.50
Bill							
05/24/2021	IDK	DAF	Attend conference call with internal team re DAF (.3).	0.30	1325.00		\$397.50
JNP	05/24/2021	DAF	0.30	0.30	1,295.00		388.50
Bill							
05/24/2021	JNP	DAF	Conference with PSZJ team regarding strategy issues concerning DAF lawsuit.	0.30	1295.00		\$388.50
JNP	05/24/2021	DAF	0.40	0.40	1,295.00		518.00
Bill							
05/24/2021	JNP	DAF	Conference with J. Elkin, John A. Morris, Gregory V. Demo, and Ira D. Kharasch regarding issues relating to DAF.	0.40	1295.00		\$518.00

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RJF Bill	05/24/2021	DAF	0.30	0.30	1,395.00	418.50	
05/24/2021	RJF	DAF	Internal call regarding DAF.		0.30	1395.00	\$418.50
JMF Bill	05/24/2021	DAF	0.30	0.30	1,050.00	315.00	
05/24/2021	JMF	DAF	Status call re contempt motion and litigation issues.		0.30	1050.00	\$315.00
GVD Bill	05/24/2021	DAF	0.40	0.40	950.00	380.00	
05/24/2021	GVD	DAF	Conference with PSZJ team re response to contempt action (partial attendance)		0.40	950.00	\$380.00



GVD Bill	05/24/2021	DAF	0.30	0.30	950.00	285.00	
05/24/2021	GVD	DAF	Attend PSZJ status conference on DAF litigation		0.30	950.00	\$285.00



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GVD Bill	05/26/2021	DAF	0.50	0.50	950.00	475.00	
05/26/2021	GVD	DAF	Review and update Morris declaration in support of order to show cause		0.50	950.00	\$475.00



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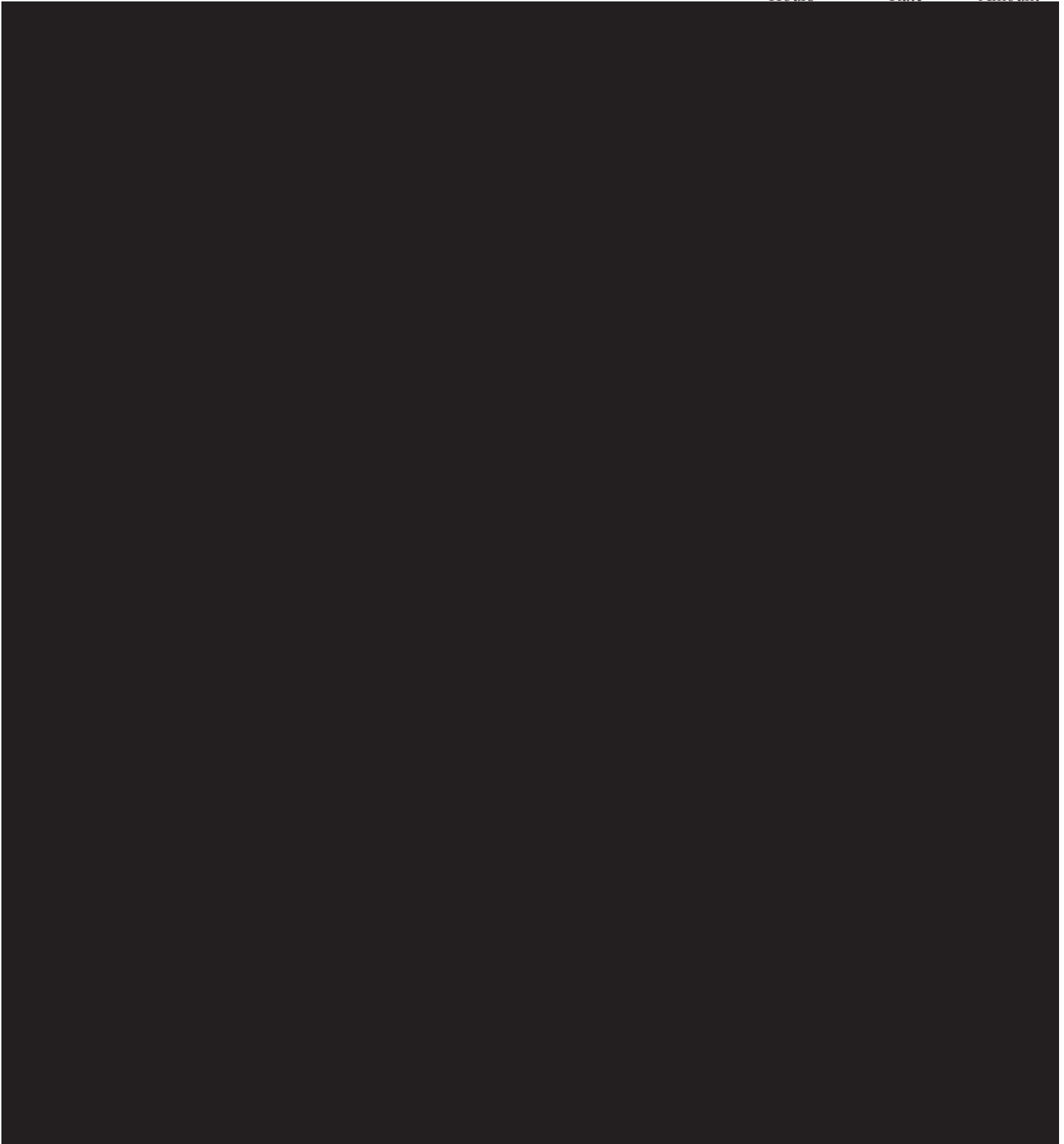
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Hours Rate Amount



JNP	05/30/2021	DAF	0.20	0.20	1,295.00	259.00
Bill						
05/30/2021	JNP	DAF	Conference with John A. Morris regarding contempt hearing and discovery.		0.20	1295.00 \$259.00
GVD	05/30/2021	DAF	1.10	1.10	950.00	1,045.00
Bill						
05/30/2021	GVD	DAF	Conference with J. Morris re document discovery		1.10	950.00 \$1,045.00
GVD	05/30/2021	DAF	1.30	1.30	950.00	1,235.00
Bill						
05/30/2021	GVD	DAF	Review document production re DAF issues		1.30	950.00 \$1,235.00
GVD	05/30/2021	DAF	0.60	0.60	950.00	570.00
Bill						
05/30/2021	GVD	DAF	Conference with J. Morris re deposition preparation		0.60	950.00 \$570.00
JE	05/30/2021	DAF	4.80	4.80	1,195.00	5,736.00



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GVD	06/01/2021	DAF	2.30	2.30	950.00	2,185.00
Bill						
06/01/2021	GVD	DAF	Attend Dondero deposition (partial attendance)	2.30	950.00	\$2,185.00

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Highland Capital Management LP  
36027 -00002

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June 07, 2021

					Hours	Rate	Amount
GVD	06/01/2021	DAF		2.20	2.20	950.00	2,090.00
Bill							

06/01/2021	GVD	DAF	Attend G. Scott deposition (partial)	2.20	950.00	\$2,090.00
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GVD	06/02/2021	DAF		1.00	1.00	950.00	950.00
Bill							

06/02/2021	GVD	DAF	Conference with J. Morris and HCMLP re M. Patrick deposition prep	1.00	950.00	\$950.00
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GVD	06/02/2021	DAF		0.10	0.10	950.00	95.00
Bill							

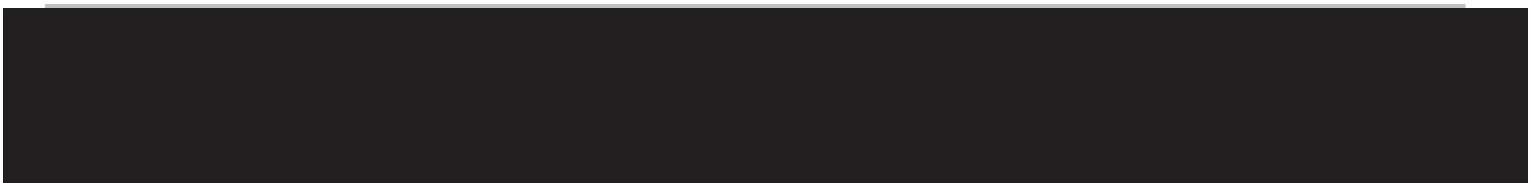
06/02/2021	GVD	DAF	Conference with J. Morris re follow up to M. Patrick deposition prep	0.10	950.00	\$95.00
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GVD	06/02/2021	DAF		0.20	0.20	950.00	190.00
Bill							

06/02/2021	GVD	DAF	Conference with J. Donohue re M. Patrick deposition issues	0.20	950.00	\$190.00
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GVD	06/03/2021	DAF		3.50	3.50	950.00	3,325.00
Bill							

06/03/2021	GVD	DAF	Review M. Patrick document production and correspondence with J. Morris re same	3.50	950.00	\$3,325.00
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GVD	06/04/2021	DAF		0.20	0.20	950.00	190.00
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					<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Bill							
06/04/2021	GVD	DAF	Conference with J. Morris re preparation for M. Patrick deposition		0.20	950.00	\$190.00
GVD	06/04/2021	DAF	2.20	2.20	950.00		2,090.00
Bill							
06/04/2021	GVD	DAF	Attend deposition of M. Patrick (partial)		2.20	950.00	\$2,090.00



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# REMITTANCE ADVICE

Please include this Remittance with your payment

For current services rendered through: 06/07/2021

Total Fees \$1,450,912.50

Total Expenses 14,097.56

Total Due on Current Invoice \$1,465,010.06

Outstanding Balance from prior invoices as of 06/07/2021 (May not include recent payments)

<u>A/R Bill Number</u>	<u>Invoice Date</u>	<u>Fees Billed</u>	<u>Expenses Billed</u>	<u>Balance Due</u>
127680	04/30/2021	\$1,286,897.00	\$8,173.58	\$1,295,070.58

Total Amount Due on Current and Prior Invoices: \$4,009,430.04

## EXHIBIT 35

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE: . Case No. 19-34054-11(SGJ)  
.  
HIGHLAND CAPITAL . Earle Cabell Federal Building  
MANAGEMENT, L.P., . 1100 Commerce Street  
.  
Debtor. . Dallas, TX 75242-1496  
.  
Monday, September 12, 2022  
9:40 a.m.

TRANSCRIPT OF HEARING ON MOTION TO WITHDRAW PROOF OF CLAIM #146  
BY HCRE PARTNERS, LLC (3443) AND  
REORGANIZED DEBTOR'S (A) OBJECTION TO MOTION TO QUASH AND FOR  
PROTECTION [DOCKET NO. 3464] AND  
(B) CROSS-MOTION TO ENFORCE SUBPOENAS TO ENFORCE SUBPOENAS AND  
TO COMPEL A DEPOSITION (3484)

BEFORE HONORABLE STACEY G. JERNIGAN  
UNITED STATES BANKRUPTCY COURT CHIEF JUDGE

TELEPHONIC APPEARANCES:

For Highland Capital Management, L.P.: Pachulski Stang Ziehl & Jones LLP  
BY: JOHN MORRIS, ESQ.  
780 3rd Avenue, 34th Floor  
New York, New York 10017

For NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC: Hoge & Gameros, L.L.P.  
BY: CHARLES W. GAMEROS, JR., ESQ.  
6116 North Central Expressway  
Suite 1400  
Dallas, Texas 75206

Audio Operator: Michael F. Edmond

Proceedings recorded by electronic sound recording, transcript  
produced by a transcript service.

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**Court's Ruling - Denied**

**55**

REORGANIZED DEBTOR'S (A) OBJECTION TO MOTION TO QUASH AND FOR PROTECTION [DOCKET NO. 3464] AND (B) CROSS-MOTION TO ENFORCE SUBPOENAS TO ENFORCE SUBPOENAS AND TO COMPEL A DEPOSITION (3484)

**Court's Ruling - Granted**

**55**

**WITNESSES**

MOTION TO WITHDRAW PROOF OF CLAIM #146 BY HCRE PARTNERS, LLC (3443)

**FOR THE DEBTOR:**

James Dondero

Direct Examination by Mr. Gameros

40/43

**FOR HCRE:**

(None)

REORGANIZED DEBTOR'S (A) OBJECTION TO MOTION TO QUASH AND FOR PROTECTION [DOCKET NO. 3464] AND (B) CROSS-MOTION TO ENFORCE SUBPOENAS TO ENFORCE SUBPOENAS AND TO COMPEL A DEPOSITION (3484)

**FOR THE DEBTOR:**

(None)

**FOR HCRE:**

(None)

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**EXHIBITS**

MOTION TO WITHDRAW PROOF OF CLAIM #146 BY HCRE PARTNERS, LLC  
(3443)

**ID EVD**

**FOR THE DEBTOR:**

1 through 16 Docket Number 3488 9 9  
With Declaration of John Morris

**FOR HCRE:**

(None)

REORGANIZED DEBTOR'S (A) OBJECTION TO MOTION TO QUASH AND FOR  
PROTECTION [DOCKET NO. 3464] AND (B) CROSS-MOTION TO ENFORCE  
SUBPOENAS TO ENFORCE SUBPOENAS AND TO COMPEL A DEPOSITION  
(3484)

**FOR THE DEBTOR:**

1 through 6 Docket Numbers 3485 and 3486 7 8  
With Declaration of John Morris

**FOR HCRE:**

(None)



1 (Proceedings commenced at 9:40 a.m.)

2 THE COURT: All right. We have a setting this  
3 morning in Highland Capital, Case Number 19-34054. We have  
4 both a motion to withdraw proof of claim of HCRE Partners, LLC,  
5 as well as the reorganized debtor's objection to a motion to  
6 quash and cross-motion to enforce subpoenas.

7 All right. So let's start by getting lawyer  
8 appearances, please. For HCRE, who do we have appearing?

9 Let me get appearances first from the main parties.  
10 For the debtor this morning, who is appearing?

11 MR. GAMEROS: Good morning, Your Honor. Bill Gameros  
12 for NexPoint Real Estate Partners f/k/a HCRE.

13 THE COURT: All right. Thank you.

14 For Highland, who do we have appearing this morning?

15 MR. MORRIS: Good morning, Your Honor. John Morris,  
16 Pachulski Stang Ziehl & Jones for Highland Capital Management,  
17 L.P.

18 THE COURT: Good morning.

19 All right. I'm guessing these are our only  
20 appearances. These are the only parties involved who filed  
21 pleadings. If there is anyone who felt the need to appear, go  
22 ahead.

23 (No audible response)

24 THE COURT: All right. Well, I don't know if you all  
25 have talked about the sequence we are going to take things this

5

1 morning. Obviously, the first filed motion is HCRE's motion to  
2 withdraw proof of claim. But we have a discovery dispute and I  
3 think -- well, we've got Highland objecting to the motion to  
4 withdraw the proof of claim, but I think the backup argument is  
5 at the very least let us take discovery before you rule on the  
6 motion to withdraw proof of claim.

7 So have you all talked about who's going to go first  
8 on this one?

9 MR. GAMEROS: Your Honor, we haven't spoken about it,  
10 but it makes sense to me that if we withdraw the proof of  
11 claim, it moots everything else. And I think that's really  
12 what we ought to do, take it all at one time.

13 THE COURT: All right. Mr. Morris, do you agree on  
14 that sequence?

15 MR. MORRIS: I'm happy to cede the podium and let Mr.  
16 Gameros go first since he filed the first motion, but I do  
17 think that Your Honor had your finger on the pulse that before  
18 -- either the motion should be denied for the reasons set forth  
19 in our papers or we should be permitted discovery.

20 THE COURT: All right.

21 With that, Mr. Gameros, I'll hear your opening  
22 statement and hear what your evidence is going to be.

23 MR. GAMEROS: We didn't file any evidence today. We  
24 just simply want to withdraw the proof of claim. I think that  
25 we've satisfied the Manchester factors.

6

1 Quite frankly, there's only been the filing of the  
2 proof of claim and a scheduling order entered. Since I've been  
3 involved in it, we've only had the scheduling order entered.  
4 Anything else that's happened in this case was a motion to  
5 disqualify that precipitated our appearance. We filed the  
6 motion to withdraw. There's no summary judgments pending, no  
7 dispositive motions pending.

8 Quite frankly, we've looked at it as the company  
9 continued to operate. The things we were worried about  
10 happening didn't happen. And as a result, we decided we don't  
11 need the proof of claim, we don't want to continue it because I  
12 think we satisfy Manchester. If the Court has any concerns at  
13 all, A, the debtor's reorganized so proceeding with our proof  
14 of claim or withdrawing it doesn't affect it and, B, you can  
15 conditionally withdraw with a forecredudous [sic] order  
16 withdrawing the proof of claim.

17 But, quite frankly, I don't think we could amend it  
18 and we passed the claims bar date. So the Court should simply  
19 allow NexPoint Real Estate Partners to discontinue pursuing a  
20 proof of claim that they don't want to continue anymore.  
21 Everything else falls after that. That's it.

22 THE COURT: All right. Well, assuming the Manchester  
23 factors apply here, you're not going to have any evidence on  
24 any of these factors?

25 MR. GAMEROS: I don't believe that we need to have

1 evidence on those. The only one that could possibly be at  
2 issue is one that the debtor might be able to bring but they  
3 haven't, and that's actual legal prejudice.

4 The withdrawal of the proof of claim here essentially  
5 says they win. And they've objected to our proof of claim, and  
6 now we're withdrawing it. So the proof of claim is resolved in  
7 their favor except we're withdrawing it instead of going  
8 through all of the exercise to get to a hearing where we don't  
9 want to pursue the proof of claim anymore.

10 THE COURT: All right. But is it a withdrawal that  
11 you seek with prejudice with any bells and whistles about  
12 future preclusion of litigation?

13 MR. GAMEROS: Your Honor, the proof of claim -- I  
14 know the Court knows this, it's its own type of proceeding.  
15 This isn't a adversary proceeding or a different kind of  
16 lawsuit. It's simply a proof of claim, and we know we're not  
17 going to be able to amend it, we're not going to be able to re-  
18 assert it because it's after the bar date. That's why the  
19 Court should allow the withdrawal and, to the extent the Court  
20 wishes to condition it, condition it with prejudice. That's  
21 it.

22 THE COURT: Mr. Morris, I'll hear from you.

23 MR. MORRIS: Thank you, Your Honor.

24 Before I begin, I'd like to move into evidence  
25 Exhibits 1 through 6 that appear at Docket 3485 and 3486.

8

1 They're mirror images of each other. They're duplicates of  
2 each other, Your Honor.

3 But because our motion -- our objection to the motion  
4 for a protective order and the cross-motion to compel were  
5 filed as one document, the Court had us file it basically twice  
6 so that one is serving as the objection to the motion for the  
7 protective order and the other is serving as the cross-motion  
8 to compel. And so you'll see at Dockets 3485 and 3486  
9 duplicate declarations from me with Exhibits 1 through 6.

10 THE COURT: All right. Any objections?

11 MR. GAMEROS: Your Honor?

12 THE COURT: Any objection?

13 MR. MORRIS: And then -- and then, Your Honor?

14 THE COURT: I'm sorry, I did not hear what Mr.  
15 Gameros said.

16 MR. GAMEROS: Your Honor, we don't object.

17 THE COURT: All right.

18 MR. GAMEROS: We don't necessarily believe it's  
19 relevant, but we don't object to its admission.

20 THE COURT: All right. They'll --

21 MR. MORRIS: And then, Your Honor, we've got --

22 THE COURT: Docket -- Exhibits 1 through 6 are  
23 admitted.

24 Go ahead.

25 (Debtor's Exhibits 1 through 6 admitted into evidence)

1 MR. MORRIS: And then at Docket 3488 we have another  
2 declaration under my signature with Exhibits 1 through 16,  
3 which are offered in opposition to HCRE's motion to withdraw  
4 their proof of claim.

5 THE COURT: Any objection?

6 MR. GAMEROS: No, Your Honor.

7 THE COURT: Okay. Those exhibits and that  
8 declaration are admitted, as well.

9 (Debtor's Exhibits 1 through 16 admitted into evidence)

10 MR. MORRIS: So, Your Honor, if I may, please, you  
11 know, the lack of evidence and the dismissiveness with which  
12 HCRE is approaching this proceeding is alarming.

13 We have litigated for two years. We were forced to  
14 move and litigate vigorously a motion to disqualify our prior  
15 counsel even though we put into evidence a document that said  
16 Wick Phillips represents Highland Capital Management. We were  
17 still forced to do that. We were forced to engage in expert.  
18 We were forced to have a hearing on this.

19 We have gone through discovery not once but twice.  
20 We have fulfilled every single obligation that were were  
21 required to fulfill under the scheduling orders. We have  
22 engaged in two rounds of written discovery. We have offered up  
23 every witness that has been noticed. We have produced  
24 thousands of pages of documents.

25 We took discovery from third parties, and this is

1 really important for a number of reasons, Your Honor. We  
2 served subpoenas on BH Equities. BH Equities is not subject to  
3 the jurisdiction in Dallas, so we served the subpoena. We took  
4 the deposition.

5           They can't be compelled to testify at a hearing.  
6 HCRE chose not to ask any questions. The accounting firm, they  
7 chose not to ask any questions. Discovery is over, okay. I  
8 hear Counsel talk about the proof of claim. We need -- and  
9 this is where the prejudice comes in. We need an order on the  
10 merits. We need to know that HCRE is never going to challenge  
11 again Highland's 46.06 percent interest in SE Multifamily.  
12 That's what we need, because that's what we were about to get  
13 and they know that. And that's why they're folding their tent.

14           We informed them that we were moving for summary  
15 judgment. In fact, just seven days before they filed their  
16 motion, we negotiated a stipulation in order to extend the  
17 expert discovery deadline so that they could file an expert  
18 report while preserving Highland's ability to move for summary  
19 judgment. HCRE knew this when it filed its motion.

20           Discovery is now closed. There's only three things  
21 left to do. There's four things left to do: take the  
22 deposition of Mr. Dondero, Mr. McGraner (phonetic) and HCRE and  
23 have a hearing on the merits.

24           I want to say right now, Your Honor, Highland is  
25 willing to forego its right to move for summary judgment. We

11

1 don't need to take that step. Let's just proceed. This motion  
2 should be denied. They offer no evidence whatsoever. Let's  
3 just proceed with the three depositions because discovery is  
4 otherwise closed and let's have a one-day trial live in your  
5 courtroom, Your Honor. We could have this done in six weeks.

6 The legal prejudice is enormous. We've set it out in  
7 our papers. Our evidence supports it. But I want to just  
8 highlight a few things. Again, I hear vagueness here. I hear  
9 you can dismiss the proof of claim with prejudice, but somehow  
10 I get the feeling from their papers from the cases that they  
11 cited to, from the quotations that say just because we get a  
12 tactical advantage doesn't mean that the motion should be  
13 denied, just because we may choose to file this in a different  
14 forum.

15 And that's the question that I really hope the Court  
16 will ask Mr. Gameros. Is HCRE waiving its right to ever  
17 challenge this again because if you can't get an unambiguous  
18 answer to that question, the motion must be denied because  
19 that's the prejudice.

20 But there's more prejudice, too. They've taken our  
21 deposition and based on what Mr. Gameros just told you, based  
22 on what's in their papers, they perceive something that  
23 happened in that deposition as being advantageous to them. If  
24 this Court were to consider dismissing this case with  
25 prejudice, it should do so on the condition that that



1 transcript cannot be used for any purpose at any time anywhere  
2 because otherwise it's not fair, otherwise we've been  
3 prejudiced by them being permitted to take our deposition but  
4 foreclosing us from taking their deposition. Either the  
5 playing field needs to be level or that deposition transcript  
6 should never see the light of day.

7           That's condition number two, not just the dismissal  
8 with prejudice here, we need an ironclad commitment that HCRE  
9 is irrevocably waiving its right to challenge Highland's  
10 interest in SE Multifamily because that would be the result if  
11 this went to trial. And that transcript of Mr. Seery as  
12 Highland's 30(b)(6) witness should never see the light of day  
13 because they're playing games. They want to use that for some  
14 other purpose. And if they want to do that, that's fine, but I  
15 get to take their depositions. The playing field has to be  
16 level, Your Honor.

17           We have spent hundreds of thousands of dollars on  
18 this case. The excuse that they're giving, the reason that  
19 they're giving for dismissing the case at this time makes no  
20 sense whatsoever. There's nothing in the proof of claim,  
21 nothing in the pleadings. There will never be any evidence.

22           There's no affidavit suggesting that Highland was  
23 interfering with SE Multifamily, that Highland threatened to  
24 interfere with SE Multifamily, that until this motion was filed  
25 that HCRE had any concerns whatsoever that Highland would be

13

1 engaging in wrongful conduct. There will never be any evidence  
2 whatsoever that HCRE ever took any steps to protect itself from  
3 this so-called interference that they're now so fearful of.

4 And I do want to -- I have to ask this question, Your  
5 Honor. If HCRE believed that they were at risk on Wednesday,  
6 August 10th, so that they had to take Mr. Seery's deposition,  
7 what happened after that that caused them 48 hours later to  
8 file this motion with no notice whatsoever?

9 It's not right, Your Honor. So let me get to the  
10 substance. This is not a motion under Rule 41. Under Rule 41,  
11 plaintiffs sometimes have the right, the unilateral right to  
12 withdraw a pleading. HCRE has no right to that today. Rule  
13 3006 is very clear. When there is a proof of claim that is  
14 contested, the proof of claim can only be withdrawn with court  
15 approval after a hearing and subject to whatever conditions the  
16 Court decides are appropriate.

17 And that's to protect the integrity of the process.  
18 And that's what we're asking the Court to do, to protect the  
19 integrity of the claims resolution process.

20 It is a fact-intensive inquiry. In this district, as  
21 HCRE has pointed out, there is precedent, the Manchester case,  
22 that sets forth a long list of factors that a court could  
23 consider in the face of such a motion. As we explain in our  
24 opposition, we believe that every single one of those factors  
25 weighs in favor of denying the motion.

14

1 I'm going to go through just a bit of it, Your Honor,  
2 because I think it's very important that everybody see exactly  
3 what's happening. In contrast to the lack of evidence by HCRE,  
4 we have all of the exhibits that have just been admitted into  
5 evidence here. The claims stated, the proof of claims, start  
6 with the proof of claim, stated that some or all of Highland's  
7 interest in SE Multifamily might be the property of HCRE.

8 It's a proof of claim that was signed by Jim Dondero. It  
9 was signed under the penalty of perjury. There is no good-  
10 faith basis for that proof of claim to have been filed, none  
11 whatsoever. If you take a look at their response to Highland's  
12 initial objection which can be found at Exhibit 7 on the  
13 initial docket, we'll put it up on the screen jut -- here's  
14 Exhibit 7 from Docket Number 3488.

15 And this is HCRE's response. And if we can go to  
16 Paragraph 5. This is the -- this is really their response  
17 here. And it says:

18 "After reviewing what documentation is available to  
19 HCRE with the debtor, HCRE believes the  
20 organizational documents relating to SC Multifamily  
21 improperly allocates the ownership percentages of the  
22 members thereto due to mutual mistake, lack of  
23 consideration, and/or the failure of consideration.  
24 As such, HCRE has a claim to reform, rescind, or  
25 modify the agreement."

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1 This is their proof of claim, that there was some  
2 mistake that happened in the drafting of the SE Multifamily  
3 documents. There is no good-faith basis for this proof of  
4 claim. There is no good-faith basis for this response that's  
5 up on the screen. And let me show you why.

6 If Your Honor had an opportunity to review BH  
7 Equities' deposition transcript, at least the portions that we  
8 specifically cited to, BH Equities is a truth third party.  
9 They're the only third party that is a member of SE  
10 Multifamily. I took their deposition. They retained Dentons.  
11 They produced documents. They acted professionally.

12 And their witness testified up, down, and sideways  
13 that from their perspective, it was a bilateral negotiation  
14 with them on one side and the grand Highland on the other side  
15 and that Highland drafted the ultimate agreement, the amended  
16 and restated LLC agreement.

17 It's an issue that is not in dispute. Highland  
18 drafted the document. People working on the Highland platform  
19 in the spring of 2019 when Mr. Dondero was in control, solely  
20 in control of Highland and HCRE.

21 So they say in that response and in the proof of  
22 claim that the allocation, the allocation is the allocation of  
23 the membership interest in SE Multifamily, they say, oh my  
24 goodness, that allocation was wrong because Highland only put  
25 in \$49,000. And Mr. Dondero signed the agreement.

1 Let's take a look just quickly at Exhibit 5, and  
2 let's see how it's possible that Mr. Dondero could swear under  
3 oath that he made a mistake. If we can go to Schedule A.

4 Take a look at this, Your Honor. This is Schedule A.  
5 It's about a page or two after Mr. Dondero's signature. It has  
6 the percentage interest that he says was a mistake as if he  
7 didn't know the capital contribution that Highland put in. And  
8 if we got to a trial, Your Honor, we would show that Highland  
9 actually reached into its pocket for the \$49,000. HCRE, in  
10 contrast, borrowed all the money, even though Highland was on  
11 the hook for the obligations to Key Bank.

12 But, nevertheless, here it is. It's in plain, plain,  
13 plain terms. The numbers are next to each other. It's not  
14 just the percentage interest. It shows the capital  
15 contribution. I'd be really interested in asking Mr. Dondero  
16 did he review this. I suspect he'll say no because that's what  
17 he usually says. But doesn't that scream fraud? How do you  
18 say you made a mistake when the numbers are on that page? I  
19 don't understand it.

20 Yet, we've spent two years and hundreds of thousands  
21 of dollars litigating this case. But here's the thing, Your  
22 Honor, it's not just in Schedule A. If we could go to Section  
23 1.7 earlier in the agreement.

24 And remember, this is a document that BH Equities  
25 says was drafted by Highland. Look at 7; 7 is company

1 ownership. That's the name of the section. Again, HCMLP has  
2 46.06 percent. Is that a mistake? How did this -- somebody  
3 should explain how this mistake happened.

4 Let's go to Section 6.1. Section 6.1 is critical,  
5 and we'll see this in a moment. This is what's known as the  
6 waterfall. It shows how the distributions of cash from SE  
7 Multifamily are going to be made to its members. And you'll  
8 see in Section 6.1A that after certain things occur, cash is  
9 going to be distributed 46.06 percent to Highland. Another  
10 mistake, I guess, without explanation.

11 Section 9.3. Section 9 deals with liquidation and  
12 termination, and 9.3 is effectively the waterfall that's  
13 supposed to be in place upon a liquidation. And at the bottom  
14 of the waterfall in 9.3(e), not surprisingly, you see the exact  
15 same allocation.

16 So the allocation that Mr. Dondero swore under oath  
17 was the result of a mutual mistake was an allocation that  
18 appears in four separate places in a document that was drafted  
19 by people under his authority. Think about that. It's  
20 extraordinary. We spent two years litigating this case, and  
21 now they just want to go home.

22 But wait, there's so much more, Your Honor. I'm not  
23 going to go through all of it, but I want to just show you two  
24 other documents because these numbers are not in this document  
25 by accident. They're there on purpose.

1 If we could go to Exhibit Number 11.

2 So if you've seen from our papers and at all, Your  
3 Honor, Highland presented an initial draft of the amended and  
4 restated agreement to BH Equities on March 14th. It had to be  
5 completed by March 15th in order to make it retroactive to the  
6 prior August because that's for tax reasons. And you'll see up  
7 on the screen there's an email exchange from Mr. Broaddus at  
8 Highland to a fellow named Dusty Thomas at BH Management.

9 And it's two emails. The first one is sent on the  
10 afternoon of March 15th. And the important point is a little  
11 bit down where he says: "The contributions schedule in the  
12 attached needs to be updated with the actual contribution  
13 numbers."

14 So this is Highland telling BH Equities that the  
15 contribution schedule, which is Schedule A, needs to be updated  
16 so that the actual contribution numbers are in it. This is the  
17 mistake. This is the mistake, right. And notice that Mr.  
18 McGraner, I'm told is one of the Apex employees, he's got  
19 notice of this. He knows exactly what's happening, right.

20 And Mr. Broaddus follows up. He follows up the next  
21 day and says the contribution schedule is attached. Well,  
22 let's take a look at what the contribution schedule is, if we  
23 can go to the next page. Look at that.

24 It's the same contribution schedule that appears in  
25 the final agreement. And this is just critical, Your Honor,

1 because this shows that Highland, people working at the  
2 direction of Highland are preparing this document and it's a  
3 stand-alone document. So it's not as if somebody can say, gee,  
4 you know, it got lost in the sauce, it was deep in the details,  
5 deep in the weeds and I just missed it.

6           The very purpose of the sending of this document was  
7 to show the other counterparty, BH Equities, exactly what the  
8 capital contribution and percentage interest were going to be,  
9 not just the percentage interest but the capital contributions.

10           Later on that day, if we can go the next document,  
11 Exhibit 13. BH Equities was very concerned about the  
12 waterfall. They wanted to make sure that they were going to  
13 get back their capital before other distributions were made.  
14 And you can see here this is an email from Mr. Thomas back to  
15 Mr. Broaddus where he raises this issue, and I'll just kind of  
16 cut to the chase. Attached to Mr. Thomas' email was a proposal  
17 that BH Equities had made the prior fall with respect to the  
18 waterfall.

19           There's no dispute that Mr. Broaddus on behalf of  
20 Highland, the big Highland, rejected BH Equities' proposal.  
21 And if we can go the prior page and see exactly what they did  
22 in response. Instead, you can see Mr. Chang, Freddie Chang,  
23 another member of the Highland complex, with a very private  
24 email to Mr. Broaddus, right, BH Equities isn't even copied on  
25 it. And he comes up, it's labeled 6.1, but this is what



1 becomes -- it's labeled 1.1, but this is what becomes 6.1 in  
2 the actual agreement. This is the waterfall. This is Mr.  
3 Chang and Mr. Broaddus exchanging an email with a new version  
4 of the waterfall that they wanted. And the new version that  
5 they wanted shows in Section 1.1(a) here that Highland was  
6 going to get 46.06 percent of the distributable cash as set  
7 forth therein.

8           A mistake? A mutual mistake when people working  
9 under Mr. Dondero's direction drafted these documents in  
10 specific -- as part of a negotiation? This is about the only  
11 thing that was the subject of a negotiation.

12           And, of course, there's more because if you take a  
13 look at the deposition transcript that we cited from BH  
14 Equities from BH Equities' perspective, Section 1.7, 6.1, and  
15 9.3 and Schedule A all reflects the parties' intent. And that  
16 deposition is closed, right. I mean they chose not to ask any  
17 questions. They didn't challenge that. There is no good-faith  
18 basis for this proof of claim to have ever been filed. And  
19 that, Your Honor, is the definition of vexatiousness, and that  
20 is one of the Manchester factors.

21           Another one of the factors is the extent to which the  
22 suit has progressed. Other than the depositions that they  
23 unilaterally shut down, the only thing left was either a  
24 summary judgment motion or a trial. Again, discovery is over.  
25 Highland has fulfilled its obligations. There is nothing left

21

1 to do here except to take three depositions and have a trial on  
2 the merits. So the suit has progressed far.

3 Duplicate of expense of re-litigation, are we really  
4 going to do this again? Are they really going to get the  
5 benefit of new discovery in a new lawsuit somewhere else that's  
6 not a proof of claim but that somehow tries to recraft it  
7 because we've seen stuff like this before from Mr. Dondero.  
8 He's going to say, oh, that was just a proof of claim, that's a  
9 different standard that somehow, you know, I can bring a  
10 different claim in a different court at a different time.  
11 We're going to do this again? I hope not.

12 How about the adequacy of the explanation? They  
13 concluded that Highland wasn't interfering. Where was the  
14 evidence that Highland ever interfered? Where was the evidence  
15 that Highland ever threatened to interfere? Where was the  
16 evidence that HCRE ever expressed a concern that Highland would  
17 interfere? Where's their application to the Court for some  
18 kind of protective order or some type of protection, some type  
19 of injunction relief to prevent us from interfering? There's  
20 nothing.

21 HCRE filed this -- and I'll have to speculate here  
22 because they're not -- I don't think they're being candid with  
23 the Court. They filed it because they hoped to do this trial  
24 in a different forum at a different time elsewhere.

25 They're shutting it down because they know that their

1 witnesses are going to be asked questions that are going to  
2 further buttress Highland's claims to breach of contract, going  
3 to get into some serious tax questions where even BH Equities  
4 wouldn't even rely on the K-1s that HCRE caused to be prepared.  
5 Really tough questions.

6 I know they want to get out now, but they never  
7 should have filed the proof of claim. And forcing Highland to  
8 go down this path to incur this expense, to take our deposition  
9 and then try to shut the door, can't think of a better fact  
10 scenario for the denial of a 3006 motion than we have here.

11 Look at just what happened in the seven days before  
12 they filed their motion because it is extraordinary, and I  
13 didn't even put everything in the papers because one of the  
14 things I forgot to put in is Mr. Gameros sent to me seven days  
15 before the motion the 30(b)(6) notice for Highland. So that's  
16 sent on August 5th.

17 On August 5th, we finish negotiating and sign a  
18 stipulation that extends the expert discovery deadline to allow  
19 them to call an expert which we think had no merit which is why  
20 we reserve the right on the motion to strike because we don't  
21 think -- as described to us at the time, but nevertheless, we  
22 reserved our right to either make a motion to strike or to  
23 proceed right to summary judgment. It's all in the stipulation  
24 that we negotiated, that we signed on behalf of the clients,  
25 and that Your Honor's approved just two days before this is

1 filed.

2 I think Mr. Seery's deposition was the 10th. At 4:00  
3 on the 9th, HCRE produced over 4,000 pages of documents like  
4 six weeks after the deadline, right. And Counsel and I spent  
5 the next 24 hours -- you know, I was pretty upset, I'll admit  
6 it, but you've got -- you know, it's in the record, you know,  
7 what my written responses were. And I tried very hard to avoid  
8 motion practice, and I tried very hard as I always do to try to  
9 come to a reasonable resolution. And we actually got to that  
10 point just moments before Mr. Seery's deposition. And then  
11 they take Mr. Seery's deposition.

12 So think about it. They serve a 30(b)(6) notice,  
13 they take a deposition, they produce 4,000 pages of documents,  
14 they negotiate and sign a stipulation to extend the discovery  
15 deadline, the Court takes the time to review the stipulation,  
16 orders it. All of this happens within seven days of their  
17 motion, two days after they take Mr. Seery's deposition and  
18 just two days before I'm scheduled to take their client's  
19 depositions.

20 Based on the complete lack of evidence on HCRE's part  
21 and the evidence that I've just shown the Court, we believe the  
22 Court should simply deny the -- deny all three motions, you  
23 know what I mean? Let's just cut to the chase, let's take  
24 three substantive depositions, and let's set a trial date.  
25 That, I believe, is the most appropriate result here.

1           If the Court is not inclined to rule on the motion to  
2 withdraw, the Court should then deny the motion for a  
3 protective order and grant our cross-motion to compel the  
4 depositions on this motion. I assure the Court that if the  
5 Court decides to follow that path, my questioning will be  
6 limited to the Manchester factors. And I won't get into the  
7 substance because that wouldn't be ripe.

8           The first question is whether or not they have a  
9 right to -- whether the Court should grant their motion to  
10 withdraw, and I will limit my questioning if we go down, you  
11 know, option B to those questions, to the Manchester questions,  
12 right. There's no question that we have the right to  
13 discovery. They filed a motion. We filed an objection. We  
14 now have a contested matter under the bankruptcy rules. We're  
15 entitled to discovery.

16           I want to address, I guess, on this topic some of the  
17 issues that were raised in the motion for the protective order.  
18 They say, oh, we didn't serve the witnesses. That's easily --  
19 well, first, I would point out that if you looked at Exhibit 1,  
20 you know, Counsel previously accepted service of subpoenas on  
21 Mr. Dondero and Mr. McGraner's behalf. Maybe he's got an  
22 explanation why he did it before but he won't do that now. But  
23 if that's the way HCRE wants to do it, we'll hire professional  
24 process servers that can -- that give us a couple of weeks and  
25 we'll find them. We'll find them. And if not, we'll get the

1 adverse inference.

2           They said we didn't give enough time, that we didn't  
3 take into account their scheduling. Just look at Exhibit 4,  
4 Your Honor. I specifically wrote to Counsel, it's there in  
5 writing. You know, it's there in writing. If you need an  
6 accommodation, let me know. Let me know if the dates and times  
7 work. I have flexibility. I told him that in writing. And  
8 yet, the reason the Court should enter a protective order is  
9 because we didn't give them sufficient time or we wouldn't take  
10 into account their schedules.

11           We've got all the time now, Your Honor. I'm actually  
12 not available next week, but after that, I can take these  
13 depositions any time the last week of September, the first week  
14 of October, whatever is convenient for them. That is no reason  
15 to grant a protective order.

16           And then, finally, this notion that, you know, Mr.  
17 McGraner and Mr. Dondero are some Apex employees, Your Honor,  
18 HCRE has no employees. None. Mr. Dondero signed the original  
19 LLC agreement. He signed the amended LLC agreement. He signed  
20 the proof of claim. Who else should I be deposing? Mr.  
21 McGraner owns a substantial interest of HCRE. He's on the  
22 emails that show he had contemporaneous knowledge that people  
23 working in the Highland complex were drafting Schedule A in a  
24 manner that was ultimately accepted not just by Highland and  
25 HCRE but by a third party, BH Equities.

1           There's nobody to depose other than Mr. McGraner and  
2 Mr. Dondero. I mean I guess Mr. Ellington, I haven't thought  
3 about that. He is a five percent owner. But for a company  
4 with no employees, who else am I supposed to depose?

5           Finally, Your Honor, I've taken probably enough time  
6 here. But option C, right, I think this just be denied  
7 outright. If not, we should at least be permitted to get some  
8 discovery before the Court rules on the motion. Option C, if  
9 the Court really wants to dismiss this -- grant the motion in  
10 any respect, there ought to be severe conditions on it.

11           It has to be a dismissal on the merits. It has to be  
12 a dismissal that pays Highland its reasonable legal fees  
13 incurred for this waste of time. And it has to be conditioned  
14 on the fact that Mr. Seery's deposition transcript will be  
15 barred from use in any proceeding going forward or they have  
16 got to show up for the depositions to level the playing field.

17           So that's where we are, Your Honor. Three choices.  
18 You know, they're in the order that we think are most  
19 appropriate. But I've got nothing further at this point, Your  
20 Honor.

21           THE COURT: All right. A couple of questions for  
22 you.

23           You've represented as an officer of the Court that  
24 your client, the estate, has incurred hundreds of thousands of  
25 dollars of attorneys' fees and costs relating to this proof of

1 claim. Is that correct?

2 MR. MORRIS: Yes, Your Honor.

3 THE COURT: Okay. And I'm just curious, did this  
4 claimant, HCRE, file other pleadings during the Highland case,  
5 like objections to the plan or -- I remember discovery disputes  
6 when Wick Phillips was involved in the main case. But I'm just  
7 curious, did you look at other times they may have participated  
8 as a party, a creditor?

9 MR. MORRIS: In all candor, Your Honor, I haven't --

10 THE COURT: Okay.

11 MR. MORRIS: -- looked at that. My memory, which  
12 could be wrong, my memory is that they did file other things,  
13 although it's possible I'm just confusing it with Wick Phillips  
14 representing different entities of Mr. Dondero. But I believe  
15 that Wick Phillips was involved in other matters. I think HCRE  
16 filed other things, but I don't know off the top of my head.

17 THE COURT: Okay. So the representation that  
18 hundreds of thousands of dollars were spent on this proof of  
19 claim dispute, I mean you're zeroing in on this proof of claim  
20 dispute. Is that correct?

21 MR. MORRIS: One hundred percent limited to this  
22 proof of claim.

23 I mean think about what we did here, Your Honor. We  
24 had a whole litigation over Wick Phillips. Both sides retained  
25 experts. We took fact discovery. We participated in written



1 discovery, something that never ever should have happened. But  
2 we were forced to do that, and I do include that as part of  
3 this.

4           What else have we done? Because I think it's -- I  
5 think Your Honor's asking a fair question, like how do you get  
6 to that number. Before the Wick Phillips' disqualification  
7 motion and the reason that we got to that point is we had  
8 engaged in written discovery. And this is back in the spring  
9 of 2021. We served, you know, document requests, we served  
10 requests to admit, we served interrogatories. All of that was  
11 answered.

12           We produced thousands of pages of documents at that  
13 time. And it was in preparing for the depositions that were  
14 then scheduled that we saw in the documents the conflict that  
15 Wick Phillips had. So we went through that whole process  
16 throughout the rest of 2021, completely unnecessary. Just  
17 completely unnecessary, but nevertheless, we did. We  
18 prevailed.

19           New counsel came in in January and did nothing,  
20 right. It took us six months to get to a scheduling order. It  
21 took me almost three months to get them to respond at all. But  
22 we did the whole thing again, and we went through more written  
23 discovery and more interrogatories and more requests to admit  
24 and more document requests. And we produced more documents.

25           We served subpoenas on Mark Patrick, on BH Equities,

1 on Baker Vigotto, the accounting firm that prepares the tax  
2 returns at the direction of HCRE on behalf of SE Multifamily.  
3 There's lots of negotiations in there. There's -- I mean Your  
4 Honor can see just how many times depositions were scheduled  
5 and rescheduled and rescheduled again to accommodate  
6 everybody's summer and business, right.

7           So we took the deposition of Mr. Patrick. We took  
8 the deposition of Barker Vigotto. We took the deposition of BH  
9 Equities. We defended Mr. Seery and his deposition. We took  
10 the time to prepare for that. We were reviewing the 4,000  
11 documents that they produced belatedly, right. We're  
12 marshaling our evidence, getting ready for our summary judgment  
13 motion. We're negotiating amendments to scheduling orders at  
14 HCRE's request.

15           Yeah, we spent several hundred thousand dollars, Your  
16 Honor, for sure.

17           THE COURT: Okay.

18           All right, Mr. Gameros, do you have cross-examination  
19 of Mr. Morris?

20           MR. GAMEROS: I don't have cross-examination of Mr.  
21 Morris. I'd just like to respond to a few points if I could.

22           Is that permitted, Your Honor?

23           THE COURT: Oh, yes. I mean this was your chance to  
24 cross-examine Mr. Morris since he submitted a declaration with  
25 exhibits. But if you decline to do that, I think Mr. Morris --

30

1 MR. GAMEROS: Cross-examine Mr. Morris, Your Honor?

2 THE COURT: Just -- Mr. Morris, the reorganized  
3 debtor rests, right? I got the impression you were resting?

4 MR. MORRIS: Yes, Your Honor.

5 THE COURT: All right.

6 MR. MORRIS: Yes.

7 THE COURT: Mr. Gameros, now your chance for  
8 rebuttal.

9 MR. GAMEROS: All right.

10 First, in terms of hundreds of thousands of dollars  
11 of fees and the activity level since my firm appeared in  
12 January of 2022, I think we need to look back at the  
13 disqualification proceeding and remember that the estate was  
14 denied its request for attorneys' fees on the disqualification  
15 and that's in this Court's order.

16 If we proceed to trial, they won't be entitled to  
17 attorneys' fees for winning, if they do. There's no claim here  
18 that entitles the estate to shift its attorneys' fees to  
19 NexPoint. None.

20 And I think that's important. The relief that he's  
21 asking for, Your Honor, if you listen to what the estate's  
22 requesting, it wants to limit the use of Mr. Seery's  
23 deposition. It wants to have a trial. Now apparently they may  
24 not move for summary judgment. Okay. Things that they would  
25 like, but all they get is a ruling on a proof of claim. And

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1 we've already said the Court should allow us to withdraw the  
2 proof of claim and condition it with prejudice.

3           There is no other lawsuit out there. There is no  
4 other position being taken anywhere. Frankly, Your Honor, the  
5 reason why I said admit the exhibits and I question their  
6 relevance is because none of them go to actual legal prejudice.  
7 Can't show it, hasn't shown it, hasn't demonstrated it. It  
8 says they did a lot of work, gave you the greatest hits of some  
9 email, but quite frankly, Your Honor, that goes to merit, not  
10 legal prejudice. That goes to, I believe, part of their story  
11 as to what happened.

12           The story that matters to me is we think things were  
13 going to happen during the estate, he's right. We didn't move  
14 for them. We looked back at it and said we don't need the  
15 proof of claim anymore, we should withdraw it. That's the only  
16 thing that's happened, and that's why we're here. We don't  
17 think he's entitled to discovery as to why we withdrew the  
18 proof of claim.

19           It's his burden to show legal prejudice. He can show  
20 it or he can't. He hasn't.

21           THE COURT: Okay.

22           MR. GAMEROS: The estate hasn't.

23           THE COURT: Mr. Gameros?

24           MR. GAMEROS: (Indiscernible) Mr. Dondero.

25           THE COURT: I have a question. I mean I'm looking at

1 your pleading, your motion to withdraw the proof of claim, and  
2 I'm looking at this wonderful chart you have on Page 7 saying  
3 here are the standards under Bankruptcy Rule 3006, you, Court,  
4 should consider. They were articulated in the Manchester case.

5 And it's not merely about is there any prejudice to  
6 the estate. I mean you set forth five factors. One is "reason  
7 for dismissal." One is diligence in bringing the motion to  
8 withdraw. One is undue vexatiousness. One is the matter's  
9 progression including trial preparation. One is duplication of  
10 expense of relitigation.

11 This is your own authority, which I believe actually  
12 is correctly articulating the standards. It's not just about  
13 prejudice. Yes, I agree that some of the case law has zeroed  
14 in on that one in particular. But I mean you say yourself  
15 reason for dismissal is a factor the Court must consider.

16 MR. GAMEROS: That's correct, Your Honor. Those are  
17 the factors, and I think our analysis on them is correct.

18 If we go all the way to trial and the result is that  
19 our proof of claim is denied, we're in the same position we are  
20 right now. So why should the parties, the estate, and the  
21 Court go through that exercise?

22 THE COURT: Okay. Well, that's another issue, I  
23 think, other than the reason for dismissal. But a follow-up  
24 question to what you just said is this.

25 Would you agree to a condition on the withdrawal of

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1 your proof of claim that your client agrees that Highland has a  
2 46-point whatever it was percent interest in SE Multifamily  
3 Holdings and your client waives any right in the future to  
4 challenge that interest?

5 MR. GAMEROS: Your Honor, if that's what the Court  
6 wants to put in an order and I have a chance to confer with my  
7 client on it, I'm pretty sure that would be agreeable.

8 THE COURT: Today's the day. I'm not going to  
9 continue. I've got, you know, the whole day booked if I needed  
10 it because I wasn't sure what you all were going to want to put  
11 on.

12 MR. GAMEROS: Your Honor, we'd agree with that.

13 MR. MORRIS: Your Honor, I'm sorry to interrupt, but  
14 a waiver of any appeal, too. I just hard that if that's what  
15 you want to put in the order, that's okay. But this case has  
16 to end, and that's what we're looking for.

17 We're a post-confirmation estate that will not go  
18 forward with the possibility hanging over its head that it may  
19 be divested of this asset. That is what this proof of claim  
20 and this dispute is about.

21 And what the debtor needs in order to avoid legal  
22 prejudice is the complete elimination of any uncertainty that  
23 it owns 46.06 percent of SE Multifamily. And if HCRE is not  
24 willing to give that comfort today, we again renew our request  
25 for a direction that the three HCRE witnesses appear for

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1 substantive depositions and we get this on the trial calendar.

2 MR. GAMEROS: Your Honor, we'll agree to it.

3 THE COURT: Well, you know what, this is such a big  
4 deal I really need a client representative to say that. It  
5 would be that --

6 MR. GAMEROS: I don't have one here today, but I can  
7 get you one.

8 THE COURT: How soon --

9 MR. GAMEROS: Do you want me to file a stipulation or  
10 an affidavit?

11 THE COURT: Pardon?

12 MR. GAMEROS: Do you want me to file an affidavit?

13 THE COURT: Well, let's be a hundred percent clear.  
14 Your client would state that with the granting of the motion to  
15 withdraw proof of claim number 146, HCRE is irrevocably waiving  
16 the right to ever challenge Highland Capital Management's 46  
17 percent interest -- and I know it's 46-point something -- 46  
18 percent interest in SE Multifamily Holdings, LLC and is,  
19 likewise, waiving the right to appeal or challenge the order to  
20 this effect.

21 MR. MORRIS: Your Honor, if I may, perhaps we can  
22 take a ten-minute recess and allow him to consult with his  
23 client and perhaps get a client representative on the phone who  
24 can make that representation?

25 THE COURT: All right. Mr. Gameros, you think you

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1 can get a client rep on the WebEx?

2 MR. GAMEROS: I'm pretty sure I can, Your Honor.

3 THE COURT: All right. Well, how about we take a 15-  
4 minute recess. Does that sound a reasonable amount of time?  
5 We've got, you know, two dozen people --

6 MR. GAMEROS: It does, Your Honor.

7 THE COURT: Two dozen people on the WebEx. I don't  
8 know if maybe one is a client representative, but we'll take a  
9 15-minute break and I'll come back. Okay.

10 THE CLERK: All rise.

11 (Recess at 10:33 a.m./Reconvened at 10:50 a.m.)

12 THE CLERK: All rise.

13 THE COURT: Please be seated.

14 We're back on the record in Highland.

15 Mr. Gameros, how did you want to proceed now?

16 MR. GAMEROS: Your Honor wanted me to get a  
17 representative of NexPoint Real Estate Partners to state that  
18 they agree that the estate has its 46 percent interest in the  
19 company agreement subject to the company agreement. And I've  
20 got Mr. Sauter here who has authority to speak on behalf of  
21 NexPoint Real Estate Partners.

22 THE COURT: All right. Well, so what is his position  
23 with HCRE?

24 MR. SAUTER: Your Honor, I don't have -- this is DC  
25 Sauter. I don't have an official position with HCRE, but I



1 have spoken with Mr. Dondero and he has authorized me to appear  
2 here today and agree to the conditions that Mr. Gameros just  
3 outlined.

4 THE COURT: All right. Well, it sounds like hearsay  
5 to me. I don't know -- Counsel, let me have you both respond.  
6 You know, I worry about this will fall apart the minute Mr.  
7 Dondero is instructing a lawyer, I never agreed to that. I  
8 mean I just don't know. This is highly unusual.

9 First --

10 MR. GAMEROS: Your Honor, if I might?

11 THE COURT: Please.

12 MR. GAMEROS: Mr. Sauter is an officer of the Court.  
13 He works, you know, with Mr. Dondero at his business at  
14 NexPoint; certainly an authorized agent on behalf of NexPoint  
15 Real Estate Partners to make this agreement on behalf of  
16 NexPoint Real Estate Partners.

17 To the extent that the condition that you originally  
18 described as a conclusory matter, in other words, how to end  
19 the withdrawal, we already agreed to that, that we also can  
20 agree on the record to waive any appeal. Mr. Sauter is  
21 authorized to agree to that, as well.

22 So I think as an agent and a lawyer on behalf of  
23 NexPoint Real Estate Partners, he's fully able to do that.

24 THE COURT: How do I know he's able to do that?

25 And, by the way, if Mr. Dondero is in I guess the

1 last 15 minutes given him authority to testify before the  
2 Court, why couldn't Dondero just get on the WebEx himself?

3 MR. SAUTER: Your Honor, I think he felt more  
4 comfortable with me being a lawyer agreeing to those terms so  
5 that he wouldn't misstate something. He has been listening. I  
6 believe he's still on, although I'm not certain.

7 THE COURT: Mr. Morris, do you want to respond? I  
8 mean I'm not sure, frankly, I care what you say, no offense. I  
9 don't think I have a person with clear authority here.

10 MR. MORRIS: I'll just be quick and say I agree.

11 THE COURT: Okay. Mr. Gameros --

12 MR. GAMEROS: As an attorney for NexPoint Real Estate  
13 Partners, I have the authority to make that agreement on the  
14 record and it be binding. Mr. Sauter is confirming that  
15 authority having spoken with Mr. Dondero about it.

16 I think that the Court is fully --

17 THE COURT: Mr. Gameros --

18 MR. GAMEROS: -- capable of doing that --

19 THE COURT: Mr. Gameros, come on. You know this is  
20 the client's decision to make. Okay. I don't have a client  
21 representative. I don't have an officer or controlling  
22 equityholder as evidence here of --

23 MR. MORRIS: Mr. Dondero --

24 THE COURT: -- the willingness to make the agreement.  
25 Pardon?

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1 MR. MORRIS: Can Mr. Dondero make the representation  
2 on the record to the Court that he is authorizing Mr. Sauter to  
3 waive any claim that HCRE has to Highland's 46.06 percent  
4 interest in SE Multifamily along with any appeal? This is just  
5 step one. But if Mr. Dondero was on the phone, let him speak  
6 up and make it crystal clear that he is delegating the full  
7 authority to Mr. Sauter to negotiate and enter into this  
8 consensual order on behalf of HCRE.

9 THE COURT: All right. Mr. Gameros, do you want to  
10 give your client authority to speak up? Your client  
11 representative, someone who's actually an officer or a  
12 controller or equity owner?

13 MR. GAMEROS: Your Honor, if Mr. Dondero can do that,  
14 that would be great. I don't know if he's in a place where he  
15 can do that.

16 THE COURT: All right. Mr. Dondero, if you can hear  
17 us, are you willing to give some quick testimony in that  
18 regard?

19 (No audible response)

20 MR. DONDERO: I can't see the box --

21 UNIDENTIFIED SPEAKER: Surprising that -- surprising  
22 he was on the phone before, but now he's not after delegating.  
23 Just I'm not --

24 MR. SAUTER: Your Honor, he's on the phone. I'm just  
25 -- if you will give me a minute, I got to run around the corner

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1 and try to make sure he knows how to unmute himself.

2 THE COURT: Star 6. If he's on a phone, star 6 is  
3 the way to unmute himself. But I want to see video, too.

4 THE OPERATOR: There we go. Try again.

5 MR. DONDERO: Hello?

6 THE COURT: All right.

7 MR. DONDERO: Hello?

8 THE COURT: Mr. Dondero, is that you?

9 MR. DONDERO: It's me. I've been on the entire time.

10 THE COURT: All right. Can you turn your video on,  
11 please?

12 MR. DONDERO: I am on my cell phone.

13 THE COURT: Okay. Well, so I guess you just called  
14 in on your cell phone, you don't have a WebEx connection on  
15 your cell phone?

16 MR. DONDERO: I don't have a WebEx.

17 THE COURT: Okay. Well -- yeah, it sounded like you  
18 were in the same office as Mr. Sauter. Is that -- did I  
19 misunderstand?

20 MR. DONDERO: We work in the same office. I'm in my  
21 car. I just stepped out of my car.

22 THE COURT: All right. Well, this is not ideal, you  
23 know, without us seeing you. But I'll go ahead and swear you  
24 in. All right. Can you hear me okay? I need to swear you in.

25 MR. DONDERO: Yes.

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1 THE COURT: All right.

2 JAMES DONDERO, HCRE'S WITNESS, SWORN

3 THE COURT: All right.

4 Mr. Gameros, do you want to ask him the questions we  
5 need to hear answers on, please?

6 MR. GAMEROS: Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY MR. GAMEROS:

9 Q Mr. Dondero, on behalf of HCRE, do you agree as a  
10 condition for withdrawing the proof of claim that HCRE will not  
11 challenge the estate's ownership or equity interest in SE  
12 Multifamily subject to the company agreement?

13 A Yes.

14 Q Do you agree that you will not appeal and that, therefore,  
15 HCRE is waiving any appeal right to that determination as a  
16 condition of withdrawing the proof of claim?

17 A Yes.

18 MR. GAMEROS: Those are the questions for Mr.  
19 Dondero.

20 MR. MORRIS: Your Honor, if I may?

21 THE COURT: Mr. Morris, you may.

22 MR. MORRIS: I'm very uncomfortable. I'm very  
23 uncomfortable with the inclusion of the language subject to the  
24 company agreement. It sounds like a very conditional waiver.  
25 We need an irrevocable unconditional admission by HCRE that

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1 Highland owns 46.06 percent of SE Multifamily, period, full  
2 stop. If they want to keep conditions in there and make it  
3 conditional and make it subject to other things, let's please  
4 deny the motion and proceed to trial.

5 THE COURT: All right. Well, Mr. --

6 MR. GAMEROS: The equity that they own is part of the  
7 company agreement. It's not modifying the company agreement by  
8 saying.

9 THE COURT: Well --

10 MR. MORRIS: Our ownership is not subject to the  
11 agreement. We either have an ownership interest or we don't.  
12 Our rights and obligations as a member of SE Multifamily are  
13 subject to the agreement, but our ownership interest is not.  
14 And that's the ambiguity that we need to remove.

15 THE COURT: Okay. Well, Mr. Gameros, do you want to  
16 rephrase the question or are you not willing to make the  
17 agreement as specific as Mr. Morris says he needs it?

18 MR. GAMEROS: That's what I'm -- I guess I don't  
19 understand what his complaint is. If the estate owns 46  
20 percent of the equity of SE Multifamily, it owns that subject  
21 to the company agreement. It's not a separate ownership  
22 interest. So I don't know what the problem is.

23 THE COURT: Okay. Let me try to phrase it as I  
24 understand it.

25 What I understand has been asserted in the proof of

1 claim is that what was set forth in the agreement was a  
2 mistake, okay. A mistake. And it sounds like you're using  
3 language that says we'll agree the agreement, you know, they  
4 have a 46 percent interest pursuant to the agreement. But that  
5 doesn't change -- that does not really zero in on the argument  
6 made in the proof of claim that there was a mistake in the  
7 agreement, right?

8           So you'd have to go broader to completely resolve the  
9 issues raised in your proof of claim and say we agree, Highland  
10 has a 46.06 interest in SE Multifamily and we agree that is  
11 correct and we waive any right to challenge it in the future  
12 and we waive any right to appeal this order.

13           MR. GAMEROS: And, Your Honor, if that's the  
14 condition, I guess my concern is that the 46 percent is still  
15 part of the company agreement. We agree not to challenge it on  
16 the basis of anything asserted in the proof of claim, that  
17 being mistake, lack of consideration, or failure of  
18 consideration. Their 46 percent is their ownership interest in  
19 SE Multifamily and HCRE won't challenge that.

20           Is that sufficient?

21           THE COURT: Well, I need to hear from your client. I  
22 mean he needs to be asked every which way from Sunday whether  
23 he is waiving the right to challenge Highland's 46.06 interest  
24 from now until eternity, okay. That's basically, you know, we  
25 either have that agreement or we'll just have a trial.

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1 CONTINUED DIRECT EXAMINATION

2 BY MR. GAMEROS:

3 Q Mr. Dondero, do you agree that NexPoint Real Estate  
4 Partners will not challenge in any way the estate's interest in  
5 SE Multifamily, its 46-point whatever percent interest that is?

6 A I think the nuance is that agreement is okay in current as  
7 of today. But it's part of an operating agreement, and that  
8 percentage ownership can change due to capital calls and other  
9 things. And it could change over time. It's never in a  
10 partnership agreement fixed into perpetuity. And so no  
11 businessman can agree to that.

12 If the Court wants it fixed into perpetuity, that would be  
13 very odd.

14 MR. MORRIS: Can we go to trial, Your Honor? Can we  
15 just deny the motion and go to trial? Let me have my  
16 depositions and go to trial. This is -- if Mr. Dondero wants  
17 to take that position, he's welcome to do that. But I'm  
18 entitled to finality, and I'd like to get there.

19 THE COURT: All right. Well, Mr. Gameros, anything  
20 else you want to ask your client that you think might be  
21 helpful?

22 BY MR. GAMEROS:

23 Q Mr. Dondero, you desire to withdraw the proof of claim.  
24 Correct?

25 A Yes.

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1 Q And you agree to an order denying the proof of claim with  
2 prejudice. Correct?

3 A Yes.

4 Q And can you agree that HCRE will not challenge the equity  
5 ownership of its member in SE Multifamily of the estate?

6 A Yes.

7 MR. GAMEROS: Your Honor, I think there it is.

8 THE COURT: Mr. Morris, do you have any --

9 MR. GAMEROS: He agrees.

10 THE COURT: -- do you have any follow-up questions --

11 MR. MORRIS: The waiver of the right to --

12 THE COURT: -- Mr. Dondero?

13 MR. MORRIS: The waiver of the right to any appeal  
14 whatsoever. And I do have -- you know, there are the other  
15 conditions that we mentioned earlier, right? Either they have  
16 to also agree that Mr. Seery's deposition transcript shall  
17 never be used for any purpose at any time or they need to level  
18 the playing field and submit their witnesses to examination.

19 The playing field needs to be level here. Either if  
20 they want to use that deposition transcript for some purpose, I  
21 have no problem with that. Just let me take my depositions.  
22 If they don't want to submit their witnesses to depositions,  
23 then they also have to agree that that transcript will never be  
24 used for any other purpose. It's as if this proof of claim has  
25 never been filed, right, for that purpose, right. Because

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1 that's just not fair. That's the legal prejudice.

2 How do you take my client's deposition on Wednesday  
3 and file this motion on Friday knowing your client's supposed  
4 to be deposed on Tuesday? Level the playing field. That's  
5 conditional number two.

6 And condition number three, frankly, Your Honor, this  
7 proof of claim was fraudulent. I mean my client has been  
8 damaged. My client has spent an enormous amount of money on  
9 this, and I'd like them to agree to if not make us whole, you  
10 know, do something because it's wrong. It's just wrong that  
11 Mr. Dondero files proofs of claim under penalty of perjury that  
12 have absolutely no basis in fact.

13 It's distressing. I'd like those two last issues  
14 addressed, as well.

15 MR. GAMEROS: Your Honor, in terms of the Court's  
16 questions in terms of finality with respect to the membership  
17 interest in SE Multifamily, Mr. Dondero agrees with the Court.  
18 He's already said that he won't waive -- that he waives, rather  
19 -- I'm sorry, let me start again.

20 He has said very clearly that he has waived appeal of  
21 this order allowing the withdrawal of the proof of claim with  
22 the conditions that you asked for. I think you should grant  
23 the motion to withdraw and we can put an end to all of this.

24 THE COURT: Okay.

25 MR. MORRIS: Here's the thing, Your Honor. We know

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1 there's going to be more litigation with HCRE. We know they've  
2 breached the contract. We know because the evidence is in the  
3 record. We know that Highland demanded access to books and  
4 records as is its contractual right back in June. We know that  
5 that notice was sent to all of Mr. Dondero's lawyers and HCRE's  
6 lawyers. And we know that that request has been absolutely  
7 categorically ignored. Okay?

8 We are going to --

9 MR. GAMEROS: This has nothing to do with the proof  
10 of claim.

11 MR. MORRIS: We are going to get -- well, no.

12 To be clear, Your Honor, that is what's driving this  
13 concern is because we know that there's going to be additional  
14 litigation. We know the tax forms are not accurate. We know  
15 there's already an existing breach of contract.

16 And what we're trying to make sure is that HCRE is  
17 not able to resurrect this concept that we don't have an  
18 ownership interest, that it's not 46.06 percent, that Mr. Seery  
19 made some admission that they're going to use in some future  
20 litigation. That's the prejudice, okay.

21 So I think step one is (indiscernible), but then we  
22 need either an agreement that the transcript isn't going to be  
23 used elsewhere or that I get the deposition of the HCRE  
24 witnesses because it's unfair prejudice to use this process to  
25 take that deposition on Wednesday, August 10th and to file this

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1 motion on Friday, August 12th. That is unfair prejudice for  
2 them to have taken my client's sworn testimony and then shut it  
3 down before I could take theirs.

4 So either eliminate it all or let it all in, right?  
5 It can't be. They can't possibly benefit from this.

6 THE COURT: Let me understand something, Mr. Morris,  
7 you just said. We know we're going to have future litigation.  
8 I mean I'm not asking for revelation of attorney-client  
9 privilege, but -- communications, but you kind of dangled it  
10 out there.

11 You're saying that the reorganized debtor intends to  
12 file litigation against HCRE because of what you think are  
13 breaches by it as manager of SE Multifamily of the existing  
14 agreement.

15 MR. MORRIS: The evidence is already in the record,  
16 Your Honor. We have -- Highland as a member of SE Multifamily  
17 has the contractual right to obtain access to inspect and copy  
18 -- those are the words, inspect and copy SEC *[sic]*  
19 Multifamily's books and records.

20 We made that request at the end of June. It's one of  
21 the exhibits that's attached that's in the record now. I made  
22 probably three different follow-up emails, and it's been  
23 completely ignored, okay.

24 HCRE is the manager of SE Multifamily, right.  
25 They're in control. They're the ones who dictate how the

1 accounting is done. They're the ones who dictate how  
2 distributions are made. They're the ones who dictate how tax  
3 forms are prepared. They have an obligation under the amended  
4 and restated agreement to cause SE Multifamily to prepare the  
5 tax returns. They're the ones who are in direct contact with  
6 Barker Vigotto.

7           There's a whole host of issues we're going to  
8 examine, but the one thing that I do know for certain, Your  
9 Honor, is that they are in breach of the agreement today  
10 because they have refused for three months now to give us what  
11 we're entitled to. And that is access to inspect and copy SE  
12 Multifamily's books and records.

13           So unless they agree to do that, and I mean pretty  
14 soon, we're not going to have any alternative. If you recall,  
15 Your Honor, Mr. Dondero's trust, the Dugaboy Trust, filed this  
16 valuation motion which we'll address in due course. I don't  
17 know where they got the number, but according to Mr. Dondero's  
18 trust, Highland's interest in SE Multifamily is worth \$20  
19 million. This is not a small asset. This is not harassment.

20           But they're not complying with their contractual  
21 obligation to give us access to inspect and copy SE  
22 Multifamily's books and records. For a \$20-million asset where  
23 it's -- I mean they're conceding now that we're the owner of  
24 those membership interest. How can they deny us access?

25           And if they don't give us that access so that we can

1 verify the value of this asset, so that we can verify whether  
2 or not we've gotten the distributions that we're entitled to,  
3 so that we can verify that the profits and losses that have  
4 been allocated to Highland were actually proper and consistent  
5 with the agreement, I'm afraid that there will be further  
6 litigation, and that's why we need to -- we need to nail this  
7 down right now because I don't want to get a counterclaim that  
8 says we left the deal open to challenging Highland's interest  
9 in SE Multifamily. That door needs to close today.

10 THE COURT: Okay. All right. Well, I'm going to  
11 start out by saying we're in a very unusual procedural posture.

12 Before I forget, Mr. Gameros, I meant to mention this  
13 at the very beginning. The motion to withdraw the proof of  
14 claim of your client, you had an odd way of signing it. I  
15 wonder if this was a mistake or you always sign this way. You  
16 signed the pleading signature Charles W. Gameros, Jr., PC.

17 Is that -- was that inadvertent or do you always sign  
18 that way? I mean a lawyer's supposed to personally sign under  
19 Rule 11 a pleading. Was that just inadvertent or do you think  
20 that's fine?

21 MR. GAMEROS: I've used that signature block for over  
22 20 years, and I've never -- no one has ever asked. I thought  
23 it was fine.

24 THE COURT: Okay. Well, no one's ever asked and you  
25 think it's fine. I think you need to go back and do some

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1 research on that, okay. I'm not sure it's fine. I'm not sure  
2 it's fine.

3 I mean you would agree that you're personally bound  
4 under Rule 11 when you file a pleading, right?

5 MR. GAMEROS: Yes, Your Honor.

6 THE COURT: I mean I know it feels a little different  
7 if you're -- well, I don't know. You're not a -- you have a  
8 firm, Hoge & Gameros, L.L.P. I mean it wouldn't be  
9 appropriate for Mr. Morris to sign a pleading Pachulski Stang,  
10 right? He has to sign his name personally on a pleading,  
11 right?

12 MR. GAMEROS: Your Honor, I'll make that change.

13 THE COURT: Okay.

14 Well, so we're in an unusual procedural context. We  
15 I think all agree that Bankruptcy Rule 3006 is the applicable  
16 authority, and it provides that, you know, a creditor can't  
17 just withdraw a claim when there's been an objection filed to  
18 it. There has to be notice and an order from the Court.

19 And so we don't run into this situation very often,  
20 but I have seen it before. And as someone or both correctly  
21 noted, it is a rule that sort of goes to the integrity of the  
22 system. Filing a proof of claim is obviously a very  
23 significant act in the context of a bankruptcy case.

24 You file a proof of claim under penalty of perjury so  
25 it's a big deal from, you know, a criminal exposure standpoint

1 but it's also a big deal because we want to make sure only  
2 parties with legitimate claims are given a seat at the table,  
3 so to speak, in bankruptcy as far as, you know, their right to  
4 a distribution, their right to be heard in a case.

5           So, you know, that's the reason for the rule. We  
6 don't see it come into play very often, but it's there because  
7 we want to make sure that we protect the integrity of the  
8 bankruptcy process. And if someone files a proof of claim and  
9 it's pending and, you know, activity happens in the bankruptcy  
10 case as a result of it, that we don't just let a party say  
11 never mind.

12           So the Manchester case, which you both cited in your  
13 pleadings, has set forth fact-intensive factors -- fact-  
14 intensive inquiry. And, again, I'm just looking at HCRE's  
15 motion, Page 7. There was a chart and it sets forth the  
16 Manchester factors. Factor number one, diligence in bringing  
17 the motion to withdraw the proof of claim.

18           In Mr. Gameros' chart, his response to that factor is  
19 that HCRE brought its motion to withdraw immediately after  
20 conferring with debtor's counsel. I don't even know what that  
21 means, okay. But what I do know is in looking at diligence of  
22 bringing the motion, the proof of claim was filed April 8th,  
23 2020. It was objected to, the proof of claim, July 30th, 2020.  
24 And then on August 12th, 2022, this motion to withdraw the  
25 proof of claim was filed.



1           So two years and one month after the objection was  
2 filed to the proof of claim HCRE withdraws it. So that doesn't  
3 seem very diligent. It's not diligent at all, to be honest.

4           Your second factor, you cited, Mr. Gameros, undue  
5 vexatiousness, and you say HCRE has not been vexatious in  
6 pursuing its proof of claim. And outside the motion to  
7 disqualify previous counsel, which is not substantive,  
8 everything in the matter has proceeded by agreement and there  
9 have been no hearings set or held.

10           Okay. Well, debtor has represented in its pleadings  
11 and today through counsel on the record that it has spent  
12 hundreds of thousands of dollars litigating this. It has  
13 mentioned that four depositions have been taken. It was Mr.  
14 Mark Patrick. It was the tax accounting firm. We had the B --  
15 the entity -- BH Equities, LLC, their representative. And then  
16 Mr. Seery. So four depositions, and I'm told a lot of written  
17 discovery.

18           And on the day before the -- well, the day after, day  
19 or two after the Seery deposition, the motion to withdraw the  
20 proof of claim was filed after 5:00 in the evening on a Friday,  
21 August 12th, and I guess a couple of business days before the  
22 depositions were to occur of Mr. Dondero and the fellow, Mr.  
23 McGraner, and I feel like there was one other deposition. I'm  
24 losing track of those.

25           But --

1 THE CLERK: The 30(b)(6).

2 THE COURT: Oh, the 30(b)(6). The 30(b)(6)  
3 representative.

4 So on top of all of that, you know, Highland argues  
5 there was just simply no good-faith basis for the proof of  
6 claim. Proof of claim asserted the membership interest,  
7 Highland's 46.06 interest, set forth in the Multifamily LLC  
8 agreement were the result of mistake.

9 Mr. Dondero signed the agreement for both parties,  
10 HCRE and Highland. And then now the motion to withdraw says  
11 something to the effect of the anticipated issues have not  
12 materialized. So anyway, the undue vexatiousness factor I  
13 think weighs -- because of these factors I've mentioned, weighs  
14 in favor of there has been undue vexatiousness.

15 Factor number three, according to HCRE's motion to  
16 withdraw the proof of claim, is matter's progression including  
17 trial preparation. Again, four depositions, thousands of pages  
18 of written discovery. We were days away from the last  
19 depositions occurring, those of HCRE's potential witnesses and  
20 we have trials set. We have a trial set in November. So that  
21 factor, again, seems to weigh heavily in favor of Highland's  
22 objection here.

23 Duplication of expense of relitigation, here's why we  
24 got Mr. Dondero on the phone or wanted to have a witness with  
25 authority. Highland is saying we are concerned about

1 relitigation of this ownership interest issue. And as part of  
2 its argument, Highland has said we've got claims, we've got our  
3 own claims for breach of agreement and different things that  
4 are going to cause us to have to drill down on terms of the LLC  
5 agreement.

6 And we can't -- we don't want to face exposure on  
7 this issue of, well, you don't have the ownership interest or  
8 the rights you say you do, Highland. So, you know, if we could  
9 get ironclad language here of, you know, we waive the right, we  
10 agree that Highland has the 46.06 interest and we waive the  
11 right to challenge that, then I don't think we'd have to worry  
12 about relitigation of the issues in the proof of claim. But it  
13 feels like we had a little bit of reluctance to say it as  
14 forcefully as we would need to have it said to avoid  
15 relitigation.

16 Reason for dismissal, I don't know. I don't know  
17 what the reason for dismissal. Again, to quote HCRE's pleading  
18 on Page 7, the reason for dismissal is, "The operation of the  
19 company" -- I think that means SE Multifamily -- "during the  
20 case and the anticipated issues therewith have not materialized  
21 and NREP no longer desires to proceed in the matters raised in  
22 the proof of claim."

23 I mean that's just not in sync with the theory  
24 espoused in the proof of claim that we think there was a  
25 mistake made in the LLC agreement. So, again, looking at these

1 legal factors, I do not think that the correct result is to  
2 grant the motion to withdraw the proof of claim under Rule 3006  
3 under the Manchester factors. I will throw in that I think  
4 there is potential for prejudice here of the debtor.

5 I mean not even considering that hundreds of  
6 thousands of dollars have been spent over two-plus years on  
7 this issue, you know, I remember very well the disqualifying  
8 motion. And I said Wick Phillips should be disqualified. I  
9 didn't shift fees because I just wasn't sure at the time that,  
10 frankly, HCRE should be imposed with the fees attributable to  
11 its lawyers, not recognizing the conflict of interest when they  
12 saw one. It was just a little fuzzy in my mind.

13 But I'm just letting you know that now that we are  
14 here many years later, many months later and we have all the  
15 sudden, okay, never mind, this is just a situation where I have  
16 some regrets I didn't shift fees, to be honest. But -- so the  
17 motion is denied. The depositions shall go forward. I'm not  
18 sure, you know, if the dates that have been proposed are still  
19 workable, but if someone wants to speak up now about those  
20 deposition dates to avoid an emergency hearing, I'm willing to  
21 hear that.

22 I think what I heard was, well, I don't know what --  
23 have you talked about dates at all? Probably not, Mr. Morris,  
24 in light of this hearing today.

25 MR. MORRIS: We have not, Your Honor. But I do think

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1 that Counsel and I can work that out. I'm not available until  
2 the week of the 26th. So it won't be early that week but  
3 sometime between let's say the 28th of September and the 7th of  
4 October, I'll be prepared to take these depositions. And I  
5 would respectfully request, and we can work with Ms. Ellison to  
6 try to find a trial date sometime the last week of October,  
7 first week of November so we can get this finished.

8 THE COURT: Okay. Did I dream up that there was a  
9 trial set already in November?

10 MR. MORRIS: You know what?

11 You know what, let's just keep that date, Your Honor.  
12 Let's just keep that date.

13 THE COURT: All right. Traci, are you still on the  
14 line? Can you confirm my memory? I thought we had a two-day  
15 trial set aside for this in November.

16 MS. ELLISON: Is this on the merits of HCRE's claims,  
17 Judge Jernigan? I have a note holding November 1 and 2.

18 THE COURT: Okay.

19 MR. MORRIS: Yeah.

20 THE COURT: So we'll go ahead and mark that down.

21 Now the last -- so you'll work on an a mutually  
22 agreeable date for these three remaining depositions sometime,  
23 you know, late September, early October. And I trust you will  
24 --

25 MR. MORRIS: Yeah. I would respectfully request that

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1 Counsel just propose dates for the depositions. I'll wait to  
2 hear from him. But I think -- I'm representing to the Court  
3 that any time between September 28th and let's just give it two  
4 full weeks, October 12th. That's plenty of time in advance of  
5 the trial.

6 THE COURT: All right. Mr. Gameros, anything you  
7 want to add on that?

8 MR. GAMEROS: No, Your Honor. I'm sure we can work  
9 with Mr. Morris to get those scheduled.

10 THE COURT: All right. And here's actually the last  
11 thing I wanted to say.

12 You know, I had thought about, you know, waiting 24  
13 hours to give you a ruling on this motion to withdraw the proof  
14 of claim and directing you all to kind of talk and see if maybe  
15 you could work out language, you know, without the pressure of  
16 the Court hovering over you that could make both of your  
17 clients satisfied.

18 I still encourage you to do that, but I'm going to  
19 pick on our U.S. Trustee. I see she's observing today, and I'm  
20 not going to ask you to say anything, Ms. Lambert. But if you  
21 all do agree, if you all in the next, you know, 24 hours come  
22 to some sort of agreement, I don't mean to be alarming, but I  
23 want it run by the U.S. Trustee because, you know, I've heard  
24 some things that have troubled me about the, you know, lack of  
25 good faith with regard to the proof of claim and, you know,

1 alleged gamesmanship.

2           And, you know, I talked earlier about this goes to  
3 the integrity of the system, you know, filing a proof of claim  
4 under penalty of perjury. Anyway, I'm feeling a little bit  
5 uncomfortable about signing off on an agreed order where there  
6 may be quid pro quos that went back and forth in connection  
7 with withdrawing a proof of claim. I mean at some point --  
8 well, that's why we have scrutiny of these things under Rule  
9 3006, right?

10           Again, there are integrity issues. And so I just --  
11 you know, if you were to work out language, I want you to run  
12 it by Ms. Lambert and I want to hear that either she was okay  
13 with it or she wasn't okay with it or maybe she declines to  
14 comment. You know, I'm not going to tell her how to do her  
15 job, but I feel like that needs to happen, okay?

16           It's just something uncomfortable going on in my  
17 brain about, you know, again a proof of claim being on file  
18 two, almost two and a half years and then, you know, okay,  
19 never mind, okay, I agree to never mind as long as you agree to  
20 XYZ.

21           And I have no idea what's in the Seery transcript. I  
22 don't have it before me. But, you know, I don't even know what  
23 that's all about. I don't even know if I care what that's all  
24 about. I just know if there are quid pro quos I feel like, you  
25 know, maybe I need to have the U.S. Trustee, you know, not per

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1 se signing off on any agreed order but at least kind of looking  
2 at it and telling me either U.S. Trustee's fine with it, U.S.  
3 Trustee is not fine with it, or U.S. Trustee declines to  
4 comment. Just I know that I've gone through the drill, okay?

5 So just letting you know I am still, you know, all  
6 open to an agreed resolution of this, okay. But we're going  
7 forward as if you can't get there, okay?

8 All right. I'll look for -- what am I going to look  
9 for? I'm going to look for an order denying the motion to  
10 withdraw proof of claim. I'm going to look for an order  
11 granting the -- well, an order resolving the objection to  
12 motion to quash and cross-motion for subpoenas saying that  
13 these three witnesses are going to appear at a mutually  
14 agreeable time either late September or early October.

15 All right. We're adjourned.

16 THE CLERK: All rise.

17 MR. MORRIS: Thank you, Your Honor.

18 (Proceedings concluded at 11:35 a.m.)

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C E R T I F I C A T I O N

I, DIPTI PATEL, court-approved transcriber, certify  
that the foregoing is a correct transcript from the official  
electronic sound recording of the proceedings in the above-  
entitled matter, and to the best of my ability.

/s/ Dipti Patel

DIPTI PATEL, CET-997

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## EXHIBIT 36

## MATTERS AWAITING FINAL JUDGMENT\*

### Pending Adversary Proceedings:

- ***Marc S. Kirschner, as Litigation Trustee for the Litigation Sub-Trust v. James D. Dondero, et al. (In re Highland Capital Management, L.P.), Adv. Proc. No. 21-03076-sgj (Bankr. N.D. Tex.).***

James Dondero and his controlled entities filed motions to dismiss the Kirschner Adversary on July 11 and July 12, 2022, and the Litigation Trustee filed his response to the motions to dismiss on September 19, 2022. Mr. Dondero and his controlled entities responses are due November 14, 2022.

- ***Charitable DAF Fund, L.P., and CLO Holdco, Ltd., v. Highland Capital Management, L.P., Highland HCF Advisor, Ltd., and Highland CLO Funding, Ltd. (In re Highland Capital Management, L.P.), Adv. Proc. No. 21-03067-sgj (Bankr. N.D. Tex.)***

On April 12, 2021, plaintiffs filed a complaint in the District Court alleging, among other things, that Highland had breached its fiduciary duty to plaintiffs in connection with the HarbourVest settlement. On September 29, 2021, the District Court referred the matter to this Court, and this Court dismissed the action on March 11, 2022. Plaintiffs appealed to the District Court, which remanded to this Court. Highland filed its renewed motion to dismiss on October 14, 2022.

### Pending Bankruptcy Court Matters, Case No. 19-34054-sgj:

- ***Motion for Determination of the Value of the Estate and Assets Held by the Claimant Trust [Docket No. 3382], as amended and supplemented by Supplemental and Amended Motion for Determination of the Value of the Estate and Assets Held by the Claimant Trust [Docket No. 3533]***

On June 20, 2022, Dugaboy filed a motion seeking a valuation of Highland's and supplemented that motion on September 21, 2022. Hunter Mountain Investment Trust filed a response effectively joining Dugaboy's motion on August 24, 2022 [Docket No. 3467]. Highland objected on August 24, 2022 [Docket No. 3465]. Responses to Highland's objections are due November 1, 2022, and Highland may respond on or before November 8, 2022. A status conference is scheduled for November 15, 2022.

- ***Motion to Conform Plan [Docket No. 3503]***

On September 9, 2022, Highland filed a motion seeking to conform the Plan to the Fifth Circuit's opinion affirming, in material part, the Confirmation Order. The Funds and the Advisors objected on September 27, 2022, and September 30, 2022, respectfully. A hearing was held on October 26, 2022 at which this Court orally approved Highland's motion, denied the Funds and Advisors' objections, and stated that it would issue a memorandum opinion.

\* Chart includes pending matters as of October 31, 2022, exclusive of the Renewed Motion. All capitalized terms used but not defined in this chart have the meanings given to them in *Highland's Objection to Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455 and Brief in Support*.

- ***Debtor's First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No-Liability Claims; and (f) Insufficient Documentation Claims [Docket No. 906] (hearing scheduled for November 1, 2022)***

On April 8, 2020, HCRE filed its proof of claim (Claim No. 146), and Highland objected. On August 12, 2022, HCRE filed a motion to withdraw its proof of claim, which was denied. A hearing is scheduled on HCRE's proof of claim for November 1 and 2, 2022.

**Pending Appeals Before the District Court:**

- ***Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (In re Highland Capital Management, L.P.), Adv. Proc. No. 21-03010-sgj (Bankr. N.D. Tex.), consolidated with Docket No. 1826.***

On September 14, 2022, this Court found that the Advisors breached their payment obligations to Highland under certain shared service and payroll reimbursement agreements [Adv. Docket No. 126]. The Advisors appealed to the District Court. A briefing schedule has not yet been set.

- ***Consolidated Notes Litigation, Adv. Proc. Nos. 21-03003-sgj, 21-03004-sgj, 21-03005-sgj, 21-03006-sgj, 21-03007-sgj (Bankr. N.D. Tex.).***

James Dondero and certain of his controlled entities issued promissory notes in favor of Highland prior to the bankruptcy case and subsequently defaulted on their payment obligations. Highland filed multiple adversary proceedings to collect on the notes and moved for summary judgment. On April 20, 2022, this Court held a trial, and on July 19, 2022, issued its report and recommendation to the District Court recommending summary judgment be granted. Mr. Dondero and his controlled entities have objected to the reports and recommendation, and the matter is currently pending before the District Court.

- ***The Charitable DAF Fund, LP v. Highland Capital Management, L.P. (In re Highland Capital Management, L.P.), Adv. Proc. No. 22-03052-sgj (Bankr. N.D. Tex.)***

Plaintiff filed its original complaint on July 22, 2021, in the District Court alleging that Highland breached its fiduciary duties to the DAF as an investor in Highland Multi-Strategy Credit Fund, L.P. On May 19, 2022, the District Court referred the matter to this Court for adjudication, and Highland filed its amended motion to dismiss on May 27, 2022, alleging that the DAF's claims should be dismissed for failure to comply with the administrative expense claim bar date. On September 30, 2022, this Court granted Highland's motion to dismiss, and the DAF appealed to the District Court. A briefing schedule has not been set.

- ***Motion for Modification of Order Authorizing Appointment of James P. Seery, Jr. Due to Lack of Subject Matter Jurisdiction [Docket No. 2242]***

DAF and CLOH filed a motion seeking modification of this Court's order appointing Mr. Seery as Highland's chief executive officer and chief restructuring officer, which was denied on June 25, 2021 [Docket No. 2506]. DAF and CLOH appealed to the District Court and moved to stay the appeal pending resolution of the appeal of the Confirmation Order. The District Court granted the motion to stay. On

September 26, 2022, after the Fifth Circuit affirmed the Confirmation Order in material part, Highland filed a motion in the District Court for summary affirmance of this Court's order. The matter has been fully briefed and is under advisement.

**Pending Appeals to the Fifth Circuit:**

- ***Debtor's Motion for Entry of an Order (i) Authorizing the (a) Creation of an Indemnity Subtrust and (b) entry into an Indemnity Trust Agreement and (ii) Granting Related Relief* [Docket No. 2491]**

Highland filed a motion seeking authority to create an indemnity subtrust, which this Court granted over Mr. Dondero, the Advisors, and Dugaboy's objections [Docket No. 2599]. Mr. Dondero, the Advisors, and Dugaboy appealed to the District Court, which affirmed this Court's order. On February 24, 2022, the Dondero entities appealed to the Fifth Circuit. Briefing is complete and oral argument is tentatively scheduled for the week of December 4, 2022.

- ***Fifth and Final Application for Compensation and Reimbursement of Expenses of Pachulski Stang Ziehl & Jones, LLP* [Docket No. 2906]**

NexPoint objected to the fees incurred by Highland's various professionals during the bankruptcy case [Docket No. 2977]. This Court denied NexPoint's objection on November 22, 2021 [Docket No. 3047]. NexPoint appealed to the District Court which denied its appeal as moot on May 9, 2022. NexPoint appealed to the Fifth Circuit on June 7, 2022. Highland's responsive brief is due on November 18, 2022.

- ***Highland Capital Management, L.P. v. James D. Dondero (In re Highland Capital Management, L.P.)*, Adv. Proc. No. 20-03190-sgj (Bankr. N.D. Tex.)**

On June 7, 2021, this Court found Mr. Dondero in contempt for violating this Court's temporary restraining order [Adv. Docket No. 190]. Mr. Dondero appealed to the District Court which upheld this Court's order on August 17, 2022. Mr. Dondero has appealed to the Fifth Circuit. His opening brief is due December 19, 2022.

- ***Motion to Compel Compliance with Bankruptcy Rule 2015.3* [Docket No. 2256] (appeal denied by District Court, appealed to Fifth Circuit)**

Dugaboy and Get Good filed a motion seeking to compel Highland to file certain reports under Rule 2015.3 [Docket No. 2256]. After a hearing, this Court denied the motion on September 7, 2021 [Docket No. 2812]. Dugaboy and Get Good appealed to the District Court, which dismissed their appeal as moot on August 8, 2021. Dugaboy and Get Good appealed to the Fifth Circuit on August 24, 2022. The Fifth Circuit has not yet set a briefing schedule.

- ***Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 150, 153, 154) and Authorizing Actions Consistent Therewith [Docket No. 1625]***

HarbourVest filed claims against Highland in excess of \$300 million. HarbourVest and Highland executed a settlement agreement which was approved by this Court over the objection of Mr. Dondero, Dugaboy, and Get Good [Docket No. 1788]. CLOH also objected but subsequently withdrew its objection. Dugaboy and Get Good appealed to the District Court. The District Court affirmed this Court's ruling on September 26, 2022. Dugaboy and Get Good appealed to the Fifth Circuit on October 4, 2022. The Fifth Circuit has not yet set a briefing schedule.

- ***Debtor's Motion for Entry of an Order Approving Settlement with UBS Securities LLC and UBS AG London Branch and Authorizing Actions Consistent Therewith [Docket No. 2199]***

Highland and UBS entered into a settlement agreement which was approved by this Court over the objection of Mr. Dondero and Dugaboy [Docket No. 2389]. Dugaboy and Mr. Dondero appealed to the District Court, which affirmed this Court's order on September 22, 2022. Dugaboy and Mr. Dondero appealed to the Fifth Circuit on October 4, 2022. The Fifth Circuit has not yet set a briefing schedule.

- ***Debtor's Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders [Docket No. 2247]***

On August 4, 2021, this Court found Mr. Dondero, CLOH, the DAF, and others in contempt for violating this Court's order appointing Mr. Seery as Chief Executive Officer and Chief Restructuring Officer. The contemptors appealed to the District Court, which affirmed this Court's order on September 28, 2022. On October 28, 2022, the contemptors appealed to the Fifth Circuit. The Fifth Circuit has not yet set a briefing schedule.

#### **Potential Appeals to the U.S. Supreme Court:**

- ***Order (i) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief [Docket No. 1943]***

On September 7, 2022, the Fifth Circuit entered its order affirming this Court's Confirmation Order in material part. Certain of the Dondero parties requested an extension of time to file a petition for a writ of certiorari in the U.S. Supreme Court, which was granted and the deadline extended to January 5, 2023.